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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 45

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD G. AUGENBLICK

UNITED STATES OF AMERICA, PETITIONER

v.

KENNETH N. JUHL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Claims in *Augenblick* (A. 313–342) is reported at 377 F. 2d 586. The opinion of the Court of Claims in *Juhl* (A. 372–395) is reported at 383 F. 2d 1009. The opinions of the Department of the Navy Board of Review in the *Augenblick* case (A. 17–58) are unreported.

JURISDICTION

The judgment of the Court of Claims in *Augenblick* was entered on May 12, 1967. A timely motion for

reconsideration was denied on November 9, 1967. By order of February 1, 1968, the Chief Justice extended the time for filing a petition for a writ of certiorari to March 7, 1968.

The judgment of the Court of Claims in *Juhl* was entered on October 13, 1967. A timely motion for reconsideration was denied on January 19, 1968.

The petition for writ of certiorari to review the judgments in both cases was filed on March 7, 1968, and was granted on April 29, 1968, 390 U.S. 1038. The jurisdiction of this Court is conferred by 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the Court of Claims, in actions for back pay, is empowered to review court-martial proceedings to determine whether the rights of the accused were violated; and if so, what is the proper extent of such review?

STATUTES AND MANUAL INVOLVED

Article 76 of the Uniform Code of Military Justice, 10 U.S.C. 876, provides:

> *Finality of proceedings, findings, and sentences.*
>
> The appellate review of records of trial provided by this chapter, the proceedings, findings, and sentences of court-martial as approved, reviewed, or affirmed as required by this chapter, and all dismissals and discharges carried into execution under sentences by courts-martial following approval, review, or affirmation as required by this chapter, are final and conclusive. Orders publishing the proceedings of courts-martial and all action taken pursuant to those proceedings are binding upon all departments,

courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial as provided in article 73, and to action by the Secretary concerned as provided in * * * article 74, and the authority of the President.

The Jencks Act, 18 U.S.C. 3500, provides in relevant part:

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. * * *

* * * * *

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in

its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such an oral statement.

Paragraph 153a, U.S. Dept. of Defense, *Manual for Courts-Martial, United States, 1951*, promulgated by Exec. Ord. No. 10214, February 8, 1951, provides in relevant part:

153. CREDIBILITY OF WITNESSES; IMPEACHMENT OF WITNESSES.—*a. Credibility of witnesses.*—

* * * * *

Also a conviction cannot be based upon the uncorroborated testimony of an alleged victim in a trial for a sexual offense, or upon the uncorroborated testimony of a purported accomplice in any case, if such testimony is self-contradictory, uncertain, or improbable. The uncorroborated testimony of an accomplice, even though apparently credible, is of doubtful integrity and is to be considered with great caution.

* * * * *

STATEMENT

UNITED STATES v. AUGENBLICK

On September 13, 1951, Commander Richard G. Augenblick was convicted by a general court-martial for the offense of committing an indecent, lewd, and lascivious act, in violation of Article 134 of the Uniform Code of Military Justice, 10 U.S.C. 934. He was sentenced to dismissal from the service. The conviction was affirmed by a Navy Board of Review, and the Court of Military Appeals denied review. Commander Augenblick then brought this suit in the Court of Claims to recover back pay, contending that his dismissal was a nullity because the proceedings at his court-martial violated his constitutional and statutory rights. The Court of Claims held the conviction void on the ground that two violations of the Jencks Act had occurred in connection with the testimony of one of the three principal witnesses at the court-martial, and that these violations amounted to a violation of due process which divested the court-martial of jurisdiction to enter an effective sentence.[1]

In order to gauge the permissibility of the Court of Claims' action, it is necessary briefly to review the testimony taken at the court-martial.

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[1] The Court of Military Appeals has applied this Court's decision in *Jencks* v. *United States*, 353 U.S. 657, to courts-martial, in an opinion which also cites the Jencks Act, 18 U.S.C. 3500. See *United States* v. *Heinel*, 9 U.S.C.M.A. 259 (1958). As a result of *Heinel*, the services consider themselves bound by the Jencks Act. See *United States* v. *Combs*, 23 C.M.R. 396 (1956) (Air Force Board of Review). It is not clear whether the Court of Military Appeals, in *Heinel*, viewed the Act as applying by its terms, or whether the court was merely exercising super-

1. TESTIMONY AT COURT-MARTIAL CONCERNING THE FACTS OF THE CHARGE

Commander Augenblick was charged with committing an act of oral sodomy with Airman Hodges, in violation of Article 125 of the Uniform Code, 10 U.S.C. 925. There were three witnesses supporting the prosecution: District of Columbia Police Officers Round and Pickeral, and Airman Hodges.

Officers Round and Pickeral testified that they were cruising in the West Potomac Basin Park in the early morning hours of January 12, 1961, when they observed a parked car with two men in it. After seeing the head of the driver disappear below the back of the seat, Pickeral left his police car to investigate. After observing briefly through the right front window of the parked car, he beckoned Round, who also walked over to observe. Both men testified that they saw the driver with his head in the passenger's lap, where the passenger's privates were exposed. (A. 263, 270–271, 276–277). The police officers then made their presence known, and ascertained the identity of the persons in the car: the driver was Commander Augenblick; the passenger, Airman Hodges.

Hodges testified that he met Commander Augen-

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visory power over court-martial procedure. The Act applies by its terms to "any criminal prosecution brought by the United States." 18 U.S.C. 3500(a). However, since the Act stemmed from the *Jencks* decision, which was an exercise by this Court of its supervisory power over district court procedure, it may be that Congress did not intend the term "criminal prosecution" to include court-martial proceedings. This Court has repeatedly disclaimed any supervisory power over the admission of evidence at courts-martial. See, *e.g.*, *Burns* v. *Wilson*, 346 U.S. 137, 145 n. 12.

blick in a White Tower Restaurant shortly after midnight, while waiting for a bus to take him back to Andrews Air Force Base, outside of Washington, and that, after a conversation, Augenblick offered him a ride (A. 187–188). Augenblick drove to the West Potomac Basin Park, parked there, and—according to Hodges' testimony—performed an act of oral sodomy. (A. 189–190).

Commander Augenblick, testifying in his own defense, stated that while driving Hodges towards the 14th Street bridge he had become very sleepy (he had had some scotch and several beers that evening) and had pulled into the Park for a short nap. He testified that he went to sleep and was awakened by the police officers. He denied that he performed an act of oral sodomy or had his head in Hodges' lap. (A. 291–292). Character witnesses for Augenblick testified that at parties, after drinking, he had a habit of taking short "cat naps." (A. 283–285, 294–295).

After the defense rested, the members of the court requested a recall of the two police officers. (A. 296). At the court's request, both men were subjected to close questioning as to the exact position of Augenblick's head relative to Hodges' lap. (A. 297–299, 302–303). Both police officers testified unequivocally that they did not see an act of oral sodomy performed. (A. 301, 302). The law officer—who serves the function of a trial judge in a court-martial—instructed the court on the elements of oral sodomy, making it plain that what the police officers stated they had

observed did not constitute this offense, while Hodges' testimony, if accepted, would establish it.[2]

The court-martial found Augenblick not guilty of the charge of oral sodomy, but found him guilty of committing an "indecent, lewd and lascivious act" in violation of Article 134 of the Uniform Code of Military Justice, 10 U.S.C. 934.[3] The court's specific finding was that Augenblick committed this act "by wilfully and knowingly placing his head in the lap of the said Hodges with his face in close proximity to the exposed penis of the said Hodges." (A. 309). This finding undeniably reflected the fact-finder's acceptance of the testimony of the police officers, rejection of Augenblick's defense that he was asleep, and non-reliance on Hodges' testimony that an act of oral sodomy had been completed.

2. CONTEXT FOR COURT OF CLAIMS' FINDING OF CONSTITUTIONAL ERROR

The alleged violation of due process found by the Court of Claims relates solely to the government's failure to produce, for use in defense counsel's cross-ex-

[2] The instruction was that penetration was necessary for the offense; that "mere oral-genital contact without penetration" was not sufficient. (A. 304). Article 125 of the Uniform Code, defining sodomy, provides that "[p]enetration, however slight, is sufficient to complete the offense." 10 U.S.C. 925. Hodges had testified that penetration had taken place (A. 189-190), while the police officers had testified that they had not observed penetration. (A. 301, 302).

[3] Article 134 prohibits "all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces * * *." It is unquestioned that conviction under this Article was for a lesser included offense of the crime charged.

amination of Hodges, a tape recording and some written notes of a pre-trial interrogation of Airman Hodges. After the police officers arrested Augenblick and Hodges and took them to the police station, the Armed Forces Police were called. They took custody of the two men and took them to Armed Forces Police Headquarters at the Naval Weapons Plant, where they were separately interrogated. At issue here is Hodges' interrogation, which lasted about 25 minutes. We discuss separately the circumstances surrounding the tape recording and the notes.

a. Interrogation of Hodges: The tape recording.

Pre-trial investigation. After a court of inquiry had referred the case to a general court-martial, a special pre-trial investigation was held at defense counsel's request (A. 98), for the purpose of determining whether a record of the Hodges interrogation had been made and could be produced.[4] At this investigation, four government agents testified: OSI (Office of Special Investigations) Agent Connor, and ONI (Office of Naval Intelligence) Agents Mendelson, James and Fason.

Connor testified that he had interrogated Hodges in the presence of Agent Mendelson (A. 103, 108). Connor stated that he had no way of knowing

[4] This special investigation is referred to as the "Peltzer investigation", after the name of the officer who heard the testimony. Prior to this investigation there had been another pre-trial investigation and an aborted court-martial that was terminated when a procedural inadequacy in the pre-trial investigation came to light. The Court of Claims rejected Augenblick's contention that, in these circumstances, the second court-martial constituted double jeopardy.

whether the interview had been recorded, but that he would assume the interrogation room was wired for sound. (A. 115).

Agent Mendelson then testified that the room was wired for sound but that he could not recall whether a recording was made of the Hodges interrogation. (A. 132–134, 137). Mendelson was the ONI agent in charge of the case at the time of the interrogation, and he testified that if a tape of the Hodges interrogation had been made, it would have been sent to his office together with the tape of the Augenblick interrogation. (A. 139–140).[5]

Mendelson could not recall receiving a tape of Hodges' interrogation. (A. 139). He testified that if he had received such a tape, it might have been erased and reused—that reuse of tapes is common where the witness has given a written statement confirming the tape, so that the tape is no longer regarded as necessary. (A. 139–140). (Hodges gave a written statement, in his own handwriting, a few hours after the initial interrogation. (A. 88–93, 107–108, 112–113, 122–125; Vol. IV, Govt's Exhibit C).) Had this been done, however, Mendelson stated that he probably would have first talked with his supervisor, and he could not recall having done this. (A. 140). Mendelson summarized his testimony as follows (A. 141):

> I don't know if one was made, or I don't have no recollection that one was made. However,

[5] A tape of the interrogation of Augenblick was concededly made and sent to Mendelson; this tape was produced and played at the pre-trial investigation. (A. 169–175).

> if it was made, it apparently—and was delivered to me—it apparently is no longer a tape of Hodges' testimony. As I say, once the statement was received and the investigation was completed, it was apparently—if I had ever received it—it has been used by some other investigator.

Next to testify was ONI Agent James, who, according to Mendelson, would have made any such recording. (A. 134–135, 137). James testified that he had made a tape of the Hodges interrogation, handling the controls from another room. (A. 146–147). The next day he carried the tapes of the interrogations of both Hodges and Augenblick to ONI headquarters and gave them to ONI Agent Fason, Mendelson's supervisor. (A. 150–151). James testified that the Hodges tape might have been reused, but that he did not know whether this had in fact occurred. (A. 151).

Agent Fason testified next. He also recalled that Agent James delivered a box of tapes to his office, but he never heard the tapes, and therefore could not state whether a tape of Hodges' interrogation had been included. (A. 154–155, 166). Fason agreed with Mendelson that, pursuant to their office procedure, a tape may be reused when the witness has made a written statement and the agent in charge of the case (here Mendelson) determines that the tape is no longer needed. He stated, however, that the agent in charge would first discuss the matter with him before returning the tape to circulation; Fason could

not recall such a discussion with Mendelson. (A. 163–165).

James was then recalled to the stand. He testified that he delivered three spools of tape to Fason: two of Augenblick's interrogation, and one of Hodges'. (A. 169). He testified that his practice was to use separate tapes for each interrogation, even though the tape might have the capacity for taking more than one interrogation, and that he had in fact used separate tapes for Hodges and Augenblick. (A. 170–171).*

The tapes of the Augenblick interrogation were then played. The Investigating Officer stated for the record that the second tape "had some recorded, partially unintelligible, apparently unrelated conversation, pertaining to another distinct investigation." (A. 174).

The Investigating Officer then noted that his appointing order required him to make findings. He stated his understanding that "the purpose and objective of the defense in this proceeding was to examine certain witnesses, under oath; that their testimony was to be recorded verbatim * * *." (A. 185). Since this

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*James was also questioned regarding a conflict that had developed between his testimony and Fason's. Fason's recollection was that when James had come to ONI headquarters with the box of tapes, Fason told him to deliver them to another agent in the office whose responsibility was to take custody of physical evidence—Agent Scinta. (A. 155–156). James' testimony, which he reiterated when recalled, was that he had given the tapes to Fason and left. (A. 151, 168, 175–177). At the later hearing held during the court-martial, Fason agreed with James (A. 237, 238–239).

purpose was achieved, the Investigating Officer suggested a waiver of findings, and the defense agreed. *Ibid.* Accordingly, the hearing closed without findings.

Court-martial testimony. After Airman Hodges had given his direct testimony at the court-martial, defense counsel made a request for production of the tape recording of the Hodges' interrogation. (A. 193-195). At this point, the law officer inquired of defense counsel whether the transcript of the pre-trial investigation would be a sufficient basis for his ruling, or whether the calling of witnesses would add testimony different from that given in the pre-trial investigation. (A. 201). Counsel replied that he wished to call witnesses so that the members of the court could judge their credibility. *Ibid.* The law officer replied that he would probably rule that the matter was to be decided by him, rather than the court. *Ibid.* Defense counsel then replied that, in that event, "the pretrial investigation would probably be the extent that we could offer through the witnesses testifying in person again." (A. 202).

After studying the transcript of the pre-trial investigation, the law officer again inquired of defense counsel whether the witnesses would testify substantially as they did at that hearing if recalled, and received the answer that "I assume they would" and that the purpose of a recall would be for purposes of assessing demeanor. (A. 207). The law officer then ruled, on the basis of his study of the pre-trial investigation transcript, that the prosecution *would* be required to conduct a further search for the

Hodges tape and to produce it or explain its failure to produce. (A. 212).

The next day, eight witnesses were called to testify before the law officer as to the further search conducted pursuant to his ruling. (A. 212–254). These witnesses testified that, with the assistance of numerous ONI employees, a thorough search of the ONI offices, lasting several hours, had been conducted. The searchers had looked into desks, file cabinets and drawers, safes, and storage spaces; but the tape had not been found. (A. 234–235, 238, 241, 245–246, 252–253).

Agent James, who had participated in the search, was further questioned about the possibilities of tracing the tape. He testified that written on a piece of paper and taped to each reel was a number corresponding to the number listed in his ledger, and that since the number is not deliberately removed a reel can usually be traced even though it has been reused. (A. 222–224, 230–231).[7]

The questioning of James also explored the possibility that Hodges' interrogation had not been transcribed due to a mechanical failure.[8] (No witness had actually heard a playback of the Hodges tape.) James

[7] James considered it possible, but "very unlikely", that the tape had been reused on another investigation and was in the possession of another agent. (A. 228). In that event the reused tape might not have been discovered even if its number had not fallen off the reel, since each agent maintains an individual log of tapes, and there is no central office log. (A. 230–231).

[8] As previously noted, *supra*, p. 12, part of the tape of the Augenblick interrogation made the same night was garbled. (A. 174).

admitted that there is no way to know "in an audio fashion" whether the machine is actually recording an interrogation, but "once the machine is set in motion * * * and we push the record button * * * and if that red light appears we have to assume it's recording." (A. 226).

Following this additional hearing, the defense requested a recall of Agent Mendelson. (A. 255). Because Mendelson had since been transferred to Norfolk, Virginia, his recall would have further delayed the proceedings. The law officer refused the defense request that he be recalled,[9] explaining that there was "no showing that any new additional or different evidence would come forward from Mr. Mendelson other than as reflected in [the pre-trial investigation]." (A. 255).

In denying the defense motion to strike Hodges' testimony because of the failure to produce a tape of his interrogation, the law officer recognized that "the burden is [not] on the defense in any respect in this matter. I feel that it is upon the government to produce or explain why it doesn't produce." (A. 255). The law officer then explained (A.256):

> Well, I might say gentlemen, that I don't feel the government can produce something that is not available. Of course, the issue is does it

[9] The law officer asked defense counsel whether Mendelson was likely to change his previous testimony. Counsel replied: "I frankly don't know sir. We had one very glaring change here this morning." (A. 251). Counsel was apparently referring to the variation in Agent Fason's testimony (see note 6, *supra*, p. 12).

> have it or does it not. I do not find from the evidence which has been considered in this out-of-court hearing any indication of any attempt to suppress this particular evidence. The government has satisfied me, at least, that reasonable effort has been made to locate this tape; the results have been negative.

Board of Review opinion. The Navy Board of Review held that the law officer had not violated the Jencks Act by refusing to require Mendelson's recall and by failing to strike Hodges' testimony. Noting that Mendelson had testified at several phases of the pre-trial proceedings and been subjected to vigorous cross-examination, the Board concluded that his recall was not required, (A. 36–37). The Board also noted that "the law officer went to great lengths to assist the defense and the government in their quest to locate the missing tape recording or determine what disposition had been made of it." (A. 36). The Board concluded: "we cannot without substantial evidence to the contrary, hold that there was a deliberate refusal to deliver the tape or that these government employees were guilty of gross negligence of a degree requiring corrective action on our part." (A. 38).[10]

A member of the Board filed a lengthy dissenting opinion, arguing that "had Mendelson been called he might have been able to answer more specifically the question of what happened to the tape." (A. 57).

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[10] The Board also emphasized that Hodges had testified at several proceedings but that despite vigorous cross-examination his testimony "did not waver." (A. 37).

b. Interrogation of Hodges: Mendelson's written notes.

At the court of inquiry preceding the court-martial, Agent Mendelson testified that during the Hodges interrogation he took notes, and further stated: "I believe that I can produce them if you feel necessary. They were just rough pencil notes as far as I recall. I don't have them with me, but I may still have them." (A. 80). At the second pre-trial investigation held for the purpose of inquiring into the tape-recording question, Mendelson also testified that "I did jot down a couple of rough notes at the time." (A. 132). However, Agent Connor, who had conducted the interrogation of Hodges, testified that he did not think Mendelson was taking notes during the interrogation. (A. 109). Neither at the court of inquiry nor at the additional pre-trial investigation did the defense cross-examine Mendelson as to the extent of his notes. At the court-martial itself—after Mendelson had been transferred to Norfolk—the defense moved for production of the notes. (A. 193–195). The law officer denied the motion, concluding, on the basis of testimony given when Mendelson was available, that the "rough notes" did not constitute "statements" producible under the Jencks Act. (A. 211, 212). The Board of Review affirmed, agreeing with the law officer's determination and pointing out in addition that, in any event, in light of the fact that Hodges' credibility was "exhaustively explored" in the course of the various proceedings, the failure to produce the notes was not prejudicial to the accused (A. 43–44).

8. THE COURT OF CLAIMS' DECISION

The Court of Claims opened its opinion by discussing its view of its power to treat as a nullity the sentence of a court-martial. The court concluded that, while it may ignore only the consequences of military proceedings that are "void" because of a failure of jurisdiction, expanding notions of "jurisdiction" in the use of habeas corpus authorized it to award back pay whenever it found serious constitutional errors in the course of a military trial. (A. 315-319). The court then proceeded to find that the law officer had violated the Jencks Act by failing to recall Mendelson and by failing to inspect Mendelson's notes *in camera*, and that these two errors "cumulated to the denial of a minimally fair trial." (A. 339). In addition, the court found that the Navy Board of Review had erroneously placed on the defense the burden of proving that the Hodges tape had not been destroyed through the culpable negligence or bad faith of the government. This latter error, in the court's view, "directly infected" the Board's affirmance of the law officer's refusal to recall Agent Mendelson. Mendelson should have been recalled, the court determined, because the law officer could not have adequately assessed his testimony by merely reading the "cold print" of the transcript of his previous testimony. (A. 332). Moreover, the court's reading of the evidence taken after Mendelson's testimony at the pre-trial investigation raised for it some serious doubts about the correctness of Mendelson's testimony, and it suggested that changes in the intervening testimony "might have reawakened

thoughts in Mendelson if he had been called again" (A. 333).

The court explained its finding of error in the failure to call for an *in camera* inspection of any notes Mendelson might have taken by noting its doubt on the question whether or not the notes were a "substantially verbatim recital of an oral statement" producible under the Jencks Act, 18 U.S.C. 3500(e)(2). Additionally, the court concluded that the Board of Review had rested its affirmance in part on the "factually erroneous statement" that defense counsel did not ask for the notes at the pre-trial proceedings at which Mendelson revealed their existence (A. 337).[11]

The court explained its conclusion that the errors it found were so pervasive as to vitiate the court-martial by noting that the Jencks Act has "constitutional overtones" (A. 338–339). In its analysis "Hodges was the all-important prosecution witness. Without his testimony it seems unlikely that the court-martial would have convicted, even of the lesser

[11] Mendelson testified at the court of inquiry and at the additional pre-trial investigation that he had taken notes. (A. 80, 132). At neither of these proceedings was he cross-examined as to the nature of these notes. Nor does the record of these proceedings reveal any attempt by the defense to obtain the notes. In the Court of Claims, however, Augenblick introduced an affidavit by his military defense counsel, stating that, after the court of inquiry, counsel had telephoned Mendelson to ask whether the notes could be produced, and was told that they could not be found. (Affidavit of Werner Windus, attached to Augenblick's Brief in Opposition in this Court). It was apparently this affidavit to which the Court of Claims referred in stating that the Board of Review made a factual error. This affidavit, however, was not in the record before the Board of Review.

offense." (A. 339). Moreover, the court decided, "Hodges must have been a very dubious witness."

> His veracity was obviously questioned by the members of the court-martial. Of the prosecution's three principal witnesses, only Hodges testified that the accused had committed an act of oral sodomy. Significantly, plaintiff was acquitted of the charge of sodomy, and convicted only of committing an indecent, lewd, and lascivious act (wilfully and knowingly placing his head in the airman's lap with his face in close proximity to the latter's exposed privates). The testimony of the civilian police officers, that they had observed the accused's head in the vicinity of Hodges' exposed privates, is not necessarily inconsistent with the accused's defense that he was very sleepy and fell asleep. There was testimony that Augenblick was prone to cat-naps. Obviously, statements made at the Naval Weapons Plant interrogation could have been of great significance in the cross-examination of Hodges.

(A. 340). In view of the "critical importance of Hodges' testimony" (A. 341–342) and the unavailability of alternate means to discover what transpired at his initial interrogation,[12] the court concluded that

[12] The court conceded that "[t]he defense did have the opportunity to question Hodges on the interrogation. (A. 341). This, however, was not in the court's view an adequate substitute for the tape recording or the notes. The record showed that the defense never asked Hodges or Mendelson what Hodges said at the interrogation. Agent Connor, who conducted the interrogation, was asked a few questions about what Hodges said, but this line of questioning was soon abandoned when it

Augenblick had been deprived of fundamental due process of law.

UNITED STATES V. JUHL[13]

Juhl, an Air Force Master Sergeant stationed in England as a military policeman, was tried by court-martial for violation of military regulations forbidding possession of Air Force Exchange merchandise in excess of reasonable quantities and selling such merchandise to persons not having exchange privileges.[14] The principal witness for the prosecution was Airman Hughes, who testified that he and Juhl, on several occasions, sold exchange merchandise to unauthorized persons and participated in irregular purchases at the base exchange (purchases made without punching the purchaser's ration card).

Paragraph 153a of the *Manual for Courts-Martial, United States, 1951* (*supra*, p. 4), in its chapter dealing with the "Rules of Evidence," contains a dis-

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became apparent that Connor's answers were not helpful to the defense. (A. 108–109).

Nor was Hodges averse to admitting under oath that he had made a prior inconsistent statement. He testified that he had said at the police station, when first arrested with Augenblick, that "nothing happened", explaining this statement by saying that Augenblick had coached him. (A. 190–191, 192). (Augenblick and Hodges, after their arrest, rode together in Augenblick's car to the police station, while the police officers rode in their patrol car. (A. 268, 278).)

[13] For the following statement of facts, we have relied on the opinion and findings of the Court of Claims, except where references to the court-martial record are made.

[14] These regulations were designed to prevent a black market in exchange goods, which sold at prices lower than those generally prevailing in England.

cussion entitled "Credibility of Witnesses." After observing that questions of credibility are normally for the fact-finders, the paragraph states:

> [A] conviction cannot be based upon the uncorroborated testimony of * * * a purported accomplice in any case, if such testimony is self-contradictory, uncertain, or improbable. The uncorroborated testimony of an accomplice, even though apparently credible, is of doubtful integrity and is to be considered with great caution.

Following an extensive analysis of the court-martial testimony, the Court of Claims held that Juhl's conviction was obtained in violation of this caveat, and that this violation deprived the court-martial of "jurisdiction", rendering the conviction subject to collateral attack.

1. TESTIMONY AT THE COURT-MARTIAL

Three charges of black market activity, involving four incidents, were sustained by the court-martial. As to each of these incidents, Airman Hughes—the accomplice—gave the principal evidence to support the conviction.

Hughes testified that he and Juhl, on several occasions, purchased exchange merchandise—chiefly cigars—in excess of their ration allowance, by having exchange employees "overpunch" their ration cards (*i.e.*, a punch-hole overlapping a previous hole for the same period). Another witness, Airman Shields, testified that he visited the Exchange with Hughes and Juhl on one occasion and purchased four cartons of cigarettes above his allowance by having his card over-

punched. He then went to a waiting car where Juhl handed him two or three boxes of cigars. A clerk at the Exchange also testified that she had sold tobacco products to Juhl in apparently large quantities—as much as eight cartons of cigarettes on one or two occasions. (A. 410–413). The Court of Claims held that the testimony of the exchange clerk was not corroborative, since she stated that Juhl's purchases of apparently large quantities were the result of his presentation of other peoples' ration cards (a legitimate practice) and since she contradicted a pre-trial statement given to investigators which had directly implicated Juhl in illegal purchases. (A. 375). The court did not discuss the question whether Shields' testimony was corroborative, apparently concluding that it was not because Shields failed to state that he observed Juhl making illegal purchases, or that Juhl observed him. (A. 410–411).

Hughes also testified that he, Juhl, and Airman Squire transported 50 boxes of exchange cigars in a Volkswagen to Squire's home, where Squire had said he had a customer. Juhl testified on his own behalf that he had made this trip, but was unaware of the presence of contraband in the car. He said that upon arrival at Squire's home he sat in the front yard with Mrs. Squire, and could not have observed the car being unloaded. Squire's testimony was that Juhl had been on the trip, and that he had remained in the front yard after arrival. (A. 408–409). The Court of Claims did not consider the testimony of Juhl and Squire as corroborative of Hughes', since those witnesses merely placed Juhl at the scene of the crime,

without further implicating him. (A. 374–375).

Hughes testified to making two trips with Juhl to a town called Southend, where they sold 140 boxes of exchange cigars. Only Hughes gave testimony regarding the first trip. (A. 406–407). Mrs. Hughes, however, was present at the second trip and gave testimony. According to Hughes' testimony, he and Juhl left their wives and children in a restaurant, drove their car to a dairy garage where they sold the cigars, and then returned. Mrs. Hughes testified that when Juhl returned to the restaurant he had a roll of English currency, and that before he returned she noticed that the car had left. (Juhl denied that he had taken the car after leaving the ladies in the restaurant.) (A. 377–379, 407–408).

The Court of Claims decided that Mrs. Hughes' testimony was "utterly devoid of probative value" and thus could not be accepted as corroboration. (A. 380). The court pointed out that the circumstances described in Mrs. Hughes' testimony could be explained in a manner consistent with Juhl's innocence; that Mrs. Hughes was a German national whose mastery of English was imperfect; and finally that, contrary to the instructions of the court, Airman Hughes had talked to his wife before she testified and had coached her. (A. 378–380).

In addition to these charges of black market activities, Juhl was charged with and convicted of dereliction of duty. Sgt. Juhl was the Non-Commissioned Officer in Charge of Law Enforcement and Security of an Air Police Squadron. (A. 396). It was charged that Air Policemen under his supervision were regu-

larly engaged in black-marketing activities and that he willfully failed to apprehend them or report the violators. (A. 401–412, 413). The testimony to support this charge was given by Captain Miller, Airman Shields, and Airman Hughes. Captain Miller was Juhl's commanding officer. He was informed by the OSI that about 49 men under his command, including ten men under Juhl's supervision, were engaged in black market activities. Captain Miller testified that, in the course of his ensuing interviews with men in the squadron, Airmen Hughes, Shields, and Squire implicated Juhl in these activities. (A. 414). In addition to Captain Miller's testimony, Hughes and Shields testified in suport of this charge. (A. 413–414). Both of these men were accomplices in the incidents to which they testified.

The Court of Claims concluded that the charge of dereliction of duty added nothing to the case, since it was based on incidents of black market activity for which Juhl was acquitted, and on the four incidents for which he was convicted and for which the only evidence, in the court's view, was unreliable accomplice testimony. (A. 380). In addition, the court declared that Captain Miller's testimony added nothing, since it was purely hearsay based on statements made to him by Airmen Hughes and Shields (who were accomplices) and by Airman Squire, whose testimony at trial did not inculpate Juhl. (A. 414).

The Court of Claims acknowledged that the requirement of corroboration "does not mean that the corroborating evidence should cover every element of the offense so as to be sufficient for conviction apart from

the accomplice's testimony." (A. 380). However, the corroborating evidence placing Sgt. Juhl at the scene of the black market activity was not deemed sufficient by the court, since "[c]orroboration cannot be found in the mere presence of the accused near the scene of the crime." (A. 380).

2. Reliability of the Accomplice Testimony

As noted, the *Manual for Courts-Martial* states that a conviction cannot be based on uncorroborated accomplice testimony that is "self-contradictory, uncertain, or improbable." The Court of Claims concluded that Hughes' testimony was self-contradictory for two reasons. First, when Hughes himself was court-martialed, he denied all participation in black market activities. (Juhl's trial occurred after Hughes had been tried, convicted, and sentenced for black market activities.) (A. 381–382). Second, there were three contradictions, deemed by the court to be "very important", between Hughes' testimony at the pretrial investigation and at the trial. There was contradiction as to whether Juhl or a third party was the source from whom Hughes obtained the telephone number of a contact in Southend; whether the car had carried transistor radios as well as cigars on the second Southend trip; and whether Juhl had sat in the car or acted as a lookout while contraband was being unloaded at Airman Squire's home. (A. 382). Since Hughes' testimony was found to be self-contradictory, it was not necessary for the court to

decide whether it was also "uncertain" or "improbable."[15]

3) WAIVER OF INSTRUCTION ON ACCOMPLICE TESTIMONY

At the conference between the law officer and defense counsel regarding the instructions to be given the court, the following colloquy occurred (A. 369):

> LO: It's my understanding, now, that the accused does not want instruction on accomplice testimony.
>
> DC: That is correct, sir. This was not the theory of the defense.

The Court of Claims commented:

> Defense counsel knew his way around court martials and his resourcefulness and zeal in behalf of his client were worthy of praise. Therefore, it is necessary to suppose he had in mind a purpose or reason the record now before us does not disclose. Apparently he had an unrecorded conference with the Law Officer on the same subject. The record reflects a conscientious effort by the Law Officer to protect the rights of the accused and doubtless he would have delivered, if requested, an instruction built around Section 153a, only unfortunately he acquiesced in the theory that it was not required in the plaintiff's interest.

(A. 384). However, the court refused to hold that there had been a waiver. First, in the court's view the defect in the evidence was such that the law officer

[15] The court's findings, although not its opinion, also discuss the evidence of another accomplice, Airman Shields, and find it to be "self-contradictory" and "improbable." (A. 414–417).

was obliged to direct judgment in favor of the accused despite defense counsel's position.[16] In addition, the court concluded that the defect was "jurisdictional" and that "the normal rule applies that a jurisdictional defect cannot be cured by waiver." (A. 385–386).

4. "JURISDICTIONAL" NATURE OF ACCOMPLICE-TESTIMONY RULE

The Court of Claims concluded that the accomplice-testimony rule prescribed by the *Manual for Courts-Martial* is "jurisdictional", and thus provides an adequate foundation for collateral attack:

> The manual is a lengthy and formidable document and it would boggle the imagination to suppose that a court martial should be totally invalid for failure to comply with any part of any provision. However, few provisions contain language as strong as the accomplice provision here under consideration. That is, few provisions say as this one does that "a conviction cannot be based" on procedure not in compliance with the rule stated. This appears to indicate plainly that power to convict in violation of this rule is not granted. It is not a mere rule of evidence or procedure.

(A. 388). The court felt that the Manual could be considered as equivalent to a statute, and then re-

[16] The court-martial record does not show that defense counsel ever moved for a directed judgment on the basis of the accomplice-testimony rule. In his assignment of errors submitted to the Staff Judge Advocate—the only appellate review that occurred in this case—defense counsel's only assignment regarding the accomplice-testimony rule was that the law officer should have given an instruction on the point. (A. 352).

ferred to "ancient and respectable doctrine that a court-martial will lose its jurisdiction by failure to follow applicable statutory procedure." (A. 387–388, 390). Discussing its recent decision in *Augenblick, supra,* and reviewing other authorities, the court concluded that "challenge of a court martial for failure to follow a statute fashioned to govern it * * * would seem to have better historic foundation than its challenge on merely constitutional grounds." (A. 393). Finally, the court concluded that the accomplice-testimony rule "goes to the basic fairness of the trial in that it deals with the existence of any probative evidence sustaining the conviction." (A. 394).

SUMMARY OF ARGUMENT

1. In these cases the Court of Claims, while purporting to confine itself to review of courts-martial for "jurisdictional" defects, has for the first time assumed the power to act as a court of error sitting in review of military tribunals. Such review is contrary to the congressional directive in Article 76 of the Uniform Code of Military Justice, 10 U.S.C. 876, that military review of court-martial convictions shall be "final and conclusive" and "binding upon on all * * * courts * * * of the United States." The legislative committee reports demonstrate that Congress intended to provide for finality of court-martial proceedings "subject only to a petition for a writ of habeas corpus"—an exception which, Congress recognized, was compelled by the constitutional status of the writ of habeas corpus. Other forms of collateral review,

however, including back-pay actions, have no such special constitutional status, and thus were not excepted from the finality provided for by Article 76.

Moreover, the Uniform Code established a civilian Court of Military Appeals, which was specifically designated by Congress to be the civilian court with the function and responsibility of ensuring fairness in court-martial proceedings, subject only to the constitutionally required exception for habeas corpus petitions. The Court of Claims—which exercises a civil jurisdiction, has a six-year statute of limitations, and generally hears these cases at a time when retrial is not possible—is plainly ill-suited to exercise the powers of an appellate tribunal in court-martial cases.

2. Under existing law at the time Article 76 was passed, back-pay actions had been utilized only to test "jurisdiction" in the traditional sense of the term; and the expansive conception of that term, as used in *Johnson* v. *Zerbst*, 304 U.S. 458, and its progeny, had been held inapplicable to collateral review of courts-martial even by habeas corpus. Thus, insofar as Article 76 may be viewed as codifying and not restricting the existing law at the time of the passage of the Code, the Court of Claims even under this test may, in a back-pay suit, inquire no further into a court-martial than to ascertain whether the military tribunal had personal and subject-matter jurisdiction, in the customary sense, and had been properly constituted.

3. Even if back-pay suits in the Court of Claims are to provide review of courts-martial equal in scope to that currently available on habeas corpus, under

neither form of proceeding is the scope of review as extensive as in collateral review of state criminal convictions. The military courts, unlike the courts of the various states, are not subject to direct review by this Court on constitutional questions; military courts, in addition, apply a unique body of substantive law and operate within a specialized system, both of which differ in a fundamental way from the law and conditions applicable in a purely civilian context. All these differences suggest a greater degree of deference to the judgments of military tribunals than is normally given the judgments of state courts upon collateral attack. Thus, the rule prescribed for habeas corpus review in *Burns* v. *Wilson,* 346 U.S. 137, is viable and sound: the decision of the military tribunals must be sustained if they gave full and fair consideration to the servicemen's constitutional claims.

4. Should the Court hold that the standards set by *Johnson* v. *Zerbst,* 304 U.S. 458, for review of state convictions, govern collateral review of court-martial convictions whether on habeas corpus or in a backpay suit, nevertheless, in these cases the Court of Claims has erred in allowing recovery. In its wide-ranging survey of cold transcripts the court has, in substance, redetermined, *de novo,* evidentiary and discretionary questions decided by military tribunals, even though these questions would not be subjected to such review on direct appeal from a conviction in a civilian court. In neither case is there any substance to the allegations of serious violations lodged by the respondents and accepted by the Court of Claims.

a. In *Augenblick,* any violations of the Jencks Act that may have occurred—and we believe there were none—did not affect the fundamental fairness of the trial and thus did not constitute a violation of due process justifying collateral attack by even the most generous standard. The prosecution made an exhaustive effort to locate the missing tape recording, and produced for cross-examination by the defense all nine government agents whose testimony might cast some light on the question. The law officer's decision not to recall one of these agents for further questioning and his determination that there had been no culpable destruction of prior statements were supported by the record, and in the context of this case would in no event be matters of constitutional dimension. Similarly, the decision of whether it was necessary to conduct a further inquiry into the nature of the written notes taken at the pre-trial interrogation of a government witness should have been left to the military tribunals. The evidence already taken indicated that these notes were "rough notes" rather than "verbatim" statements, and the defense had twice failed to cross-examine the investigator as to the nature of the notes.

Moreover, the alleged Jencks Act violations related solely to the testimony of one witness; the decision of the court-martial convicting Augenblick of a lesser offense than that charged demonstrated that the court refused to rely on the testimony of this witness, for whom further sources of impeachment would obviously have been academic. The conviction rested solely on the testimony of two police officers not involved in

the Jencks Act questions. For this additional reason, the alleged violations cannot be said to have affected the fundamental fairness of the trial.

b. In *Juhl* the Court of Claims concluded that the manner of phrasing the accomplice-testimony rule in the *Manual for Courts-Martial* indicated that it was a "jurisdictional" requisite which the court could independently examine, and which it found had not been satisfied. Neither conclusion was correct; the rule expresses a customary guide to assessment of evidence, and was adequately complied with at the trial. In addition, inquiry into that issue took the Court of Claims on an extended review of a years-old record to determine questions of credibility. Just as this Court has held in habeas corpus cases, re-evaluation of evidence is inappropriate on collateral review; so too, these are questions plainly beyond the competence of the Court of Claims in court-martial cases.

ARGUMENT

We recognize that since its creation by Congress, toward the end of the last century, the Court of Claims has entertained suits for back pay brought by servicemen who had been convicted by courts-martial.[17] Many of those suits eventually reached this

[17] The Court of Claims does not, of course, have general jurisdiction over all claims made upon the government. *Thurston* v. *United States*, 232 U.S. 469, 476. Back-pay suits are regarded as coming within the terms of 28 U.S.C. 1491, which provides for jurisdiction to render judgment against the United States on any claim "founded either upon the Constitution, or an Act of Congress, or any regulation of an executive department * * *." Contrary to the suggestion of respondent Augen-

Court for review. See, *e.g.*, *Keyes* v. *United States*, 109 U.S. 336; *Runkle* v. *United States*, 122 U.S. 543; *Swaim* v. *United States*, 165 U.S. 553; *United States* v. *Brown*, 206 U.S. 240.[18] There are, however, two significant factors which should be pointed out in connection with this line of cases. *First*, all of the decisions proceeded on the premise, expressed or assumed, that a serviceman could be considered entitled to an award of *pay* by the Court of Claims only where in law the court-martial proceedings were utterly void, not merely suffering from some procedural

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blick in his Brief in Opposition to certiorari (p. 28), merely phrasing a grievance in constitutional terms does not for these purposes make the claim one "founded" on the Constitution, for, as the Court of Claims has itself recently explained, the grant of authority in Section 1491 means that the claimant must assert that the provision relied on affirmatively confers the right to a certain sum (typically, in a claim founded on the Constitution, the right to "just compensation" for property taken by the government). *Eastport Steamship Corp.* v. *United States*, 372 F. 2d 1002, 1007 (1967). Thus, in cases like the present ones, the claims are not for damages caused by "constitutional" violations, but for the statutorily authorized pay that would have been received but for the sentences of the courts-martial. See Brenner, *Judicial Review by Money Judgment in the Court of Claims*, 21 Fed. B.J. 179, 190 (1961). There is no contention that the "wrongful conviction" statute, 28 U.S.C. 1495, applies to the instant cases.

[18] Some commentators have questioned the authority of the Court of Claims to award "back pay," the compensation due a person by virtue of his *status* as a member of the armed forces, when as a matter of fact he has undeniably been dismissed from the service under a court-martial sentence that—regardless of the pronouncement of the Court of Claims—remains effective. See Philos, *Suits in the Court of Claims Involving Status—A Dilemma*, 16 Fed. B.J. 103, 110–127 (1956). See, also, Kuenzel, *Federal Court Jurisdiction Over Courts-Martial*, 1 Washburn L. Rev. 25, 28 n.16 (1960).

error—even of possibly constitutional magnitude. This Court long ago explained the basis for confining collateral review of courts-martial to an inquiry solely into the jurisdiction (in the traditional sense, see *infra,* pp. 49–51) *vel non* of the court-martial:

> Where there is no law authorizing the court-martial, or where the statutory conditions as to the constitution or jurisdiction of the court are not observed, there is no tribunal authorized by law to render the judgment. [*Keyes* v. *United States, supra,* 109 U.S. at 340; accord, *Swaim* v. *United States, supra,* 165 U.S. at 555.]

Second, all of these cases arose prior to the post-World War II reform of the Articles of War, which assured significant protections for the rights of accused and created regularized appellate procedures. Also, of course, they antedated the general restructuring of military law in the Uniform Code of Military Justice in 1950 and the establishment of the United States Court of Military Appeals as the "civilian 'Supreme Court' of the Military."[19] It is against this background that one must appraise the role, if any, which Congress has entrusted to the Court of Claims in the administration of modern military justice.

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[19] Warren, *The Bill of Rights and the Military,* 37 N.Y.U.L. Rev. 181, 188 (1962).

I

ARTICLE 76 OF THE UNIFORM CODE OF MILITARY JUSTICE PRECLUDES JUDICIAL REVIEW OF COURT-MARTIAL PROCEEDINGS IN BACK-PAY ACTIONS IN THE COURT OF CLAIMS

1. Article 76 of the Uniform Code of Military Justice (*supra*, pp. 2–3) provides that, once the prescribed channels of direct review have been traversed, court-martial sentences are "final and conclusive" and "all dismissals * * * and all action taken pursuant to those proceedings are binding upon all * * * courts * * * of the United States * * *." 10 U.S.C. 876. In its *Augenblick* decision, the Court of Claims referred to the legislative history of Article 76—showing that Congress did not intend by this Article to abolish review by habeas corpus—and concluded that Congress could not reasonably have intended to create a distinction between habeas corpus and other forms of collateral attack. We submit, on the contrary, that this very legislative history reflects a clear purpose to confine collateral review to habeas corpus. Both the House and Senate Committee Reports on the Code—which must be regarded as the items of legislative history most accurately explaining what the full Congress understood the effect of Article 76 to be—state this purpose clearly:

> Subject only to a petition for a writ of habeas corpus in Federal Court, [Article 76] provides for the finality of court-martial proceedings and judgments.

S. Rep. No. 486, 81st Cong., 1st Sess., p. 32; H. Rep. No. 491, 81st Cong., 1st Sess., p. 35.

Nor does an anomaly result if Congress is taken at its word. The legislative judgment merely respects the special constitutional status of the writ of habeas corpus under the Suspension Clause (Article I, Section 9) of the Constitution. There is, of course, no corresponding constitutional policy either to create or to preserve a collateral remedy in the Court of Claims where personal liberty is not at stake. Thus, the House Committee Report explained that the Court of Military Appeals, established by the Code, was designed to be "the court of last resort for court-martial cases, except for the constitutional right of habeas corpus." H. Rep. No. 491, 81st Cong., 1st Sess., p. 7.[20] See, also, 95 Cong. Rec. 5721 (remarks of Rep. Brooks). It had been explained in the committee hearings that any restriction on the right of

[20] One of the principal drafters of the Code, in discussing the Court of Military Appeals, explained in committee hearings that "there is still a way to go to the Supreme Court of the United States, actually, and that is by habeas corpus." *Hearings on H.R. 2498 before a Subcommittee of the Committee on Armed Services of the House of Representatives*, 81st Cong., 1st Sess. (March 7–April 4, 1949) (hereinafter called "*House Hearings*") at pp. 1277–1278. This statement was made by Mr. Felix Larkin. Mr. Larkin, an Assistant General Counsel in the Office of the Secretary of Defense, was executive secretary of the working group that initially drafted the Code and was the principal assistant to Professor Edmund M. Morgan, who was responsible for preparing the draft of the Code submitted by the Government. 96 Cong. Rec. 1354; *House Hearings*, p. 846; *Hearings before a Subcommittee of the Committee on Armed Services, United States Senate, on S. 857 and H.R. 4080*, 81st Cong., 1st Sess. (held April 27–May 27, 1949) (hereinafter called "*Senate Hearings*"), at pp. 38–39 (testimony of Edmund M. Morgan) and p. 129 (testimony of Frederick Bernays Wiener).

habeas corpus would involve a constitutional problem.[21] And Senator Kefauver, in discussing Article 76, pointed out that "Congress, through its enactment, did not, and could not, * * * intend to take away the jurisdiction of the Supreme Court or of other courts in habeas corpus matters." 96 Cong. Rec. 1414.

Assuming that the Court of Claims was authorized, before the enactment of the finality clause, to entertain some suits for back pay in the face of a court-martial sentence, we cannot agree that this type of monetary action must enjoy status equal to that of the writ of habeas corpus.[22] To assert such an equivalence is to ignore "the extraordinary prestige of the Great Writ, *habeas corpus ad subjiciendum*, in Anglo-American jurisprudence" as well as its "explicit recognition in the Federal Constitution." *Fay* v. *Noia*, 372 U.S. 391, 399–400. Congressional awareness of the extraordinary status of habeas corpus, and its explicit recognition that the availability of the writ would not be impeded by the finality provision of Article 76, scarcely implies a similar exception for back-pay suits.

2. The finality provision of Article 76 is best understood in light of Article 67 of the Uniform Code, which established a Court of Military Appeals to be

[21] *House Hearings*, at p. 799 (testimony of Frederick Bernays Wiener).

[22] Several commentators noted that the finality provision might be effective to deprive the Court of Claims of any role in court-martial review, while still permitting habeas corpus in appropriate cases. See Pasley, *The Federal Courts Look at the Court-Martial*, 12 U. Pitt. L. Rev. 7, 34 (1950); Bishop, *Civilian Judges and Military Justice: Collateral Review of Court-Martial Convictions*, 61 Colum. L. Rev. 40, 61 (1961).

composed solely of civilians." 10 U.S.C. 867. The legislative history of the Code reveals an extended discussion of the proper role of civilian judges in reviewing court-martial convictions. On the one hand, several proposals were made to render court-martial convictions directly reviewable by the federal courts on questions of law; only in this manner, it was urged, could fairness in court-martial proceedings be assured. 96 Cong. Rec. 1302, 1304 (Senator Tobey); *Senate Hearings,* pp. 157, 161, 238; *House Hearings,* p. 2084. On the other hand, there were objections to any civilian review of court-martial proceedings, on the ground that civilians could not properly assess the considerations of military discipline inherent in courts-martial. *House Hearings* pp. 778–781, 794–796 (Frederick Bernays Wiener); *Senate Hearings,* pp. 259–260 (Maj. Gen. Green, Judge Advocate General of the Army).

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[22] Under the new procedures created or regularized by the Code, the Court of Military Appeals has supervisory control over the entire system of military justice, a system which in some ways is even more liberal toward an accused than is the appellate process in the civil courts. Under the Code, general courts-martial are subject to varying degrees of review by the convening authority, a Board of Review, the Judge Advocate General, the Court of Military Appeals, and the service Secretary involved. See Articles 64–69, 10 U.S.C. 864–869. At certain levels the Code authorizes ameliorative action even in the absence of any legal error. See *Jackson v. Taylor*, 353 U.S. 569, 574–577. It is only after these processes have been completed that Article 76 decrees that the proceedings are to be "final and conclusive" on all courts, agencies, and offices of the United States—except, however, for the continuing authority of the President and the service Secretary under Articles 74 and 75, 10 U.S.C. 874, 875, to grant further relief, and except for constitutionally guaranteed habeas corpus.

The establishment of a Court of Military Appeals, to consist of civilian members only, and "completely removed from all military influence or persuasion," [24] represented a compromise between these viewpoints: on the one hand, final review would be entrusted to a civilian body dedicated to constitutional concepts of fair procedure, while at the same time this tribunal of last resort would be a specialized court that would gain familiarity with military problems. Professor Morgan, the principal draftsman of the Code, explained the nature of the compromise:

> Senator Saltonstall: In other words, * * * unless you have this final Court of Military Appeals you are not really carrying through the whole principle of justice as we know it in our system of courts and system of life here in the United States?
>
> Mr. Morgan: That is my point, Senator. We recognize that this is a combination of administration of justice and discipline. In our opinion there is just no question that you cannot ignore the disciplinary aspect of the thing, but we feel that by the system we have set up, we have made a fair compromise of the thing and we are also insistent that when you have an Army that is composed of citizens, and who are drafted and particularly if you are going to have a draft during peacetime, you have got to have morale at home as well as morale in the Army; and that,

[24] H. Rep. No. 491, 81st Cong., 1st Sess., p. 7. To insure that the court would be composed of "highly qualified" civilians Congress provided that its judges would receive the same compensation as judges of the United States courts of appeals. See S. Rep. No. 486, 81st Cong., 1st Sess., p. 28.

> unless our citizens believe that a man, when he is charged before a court martial, is going to get the same kind of a square trial that he would get in the United States district court if he were charged there, then it seems to me you are going to have this constant dissatisfaction, this constant agitation against the Army and Navy and Air Force for the way they treat their men when they are charged with offenses.

Senate Hearings, p. 49.

Thus, in developing this structure, Congress deliberately and carefully determined the extent to which—apart from constitutionally guaranteed habeas corpus—civilian agencies have a role to play in military justice. Providing that civilians may serve on Boards of Review and that there shall be control by a civilian Secretary, the Code goes on to create a civilian Court of Military Appeals entrusted with the final judicial responsibility for the supervision of military justice.

As Professor Morgan had made plain, the Court of Military Appeals was not established solely to provide uniform interpretation of military law; it was also entrusted with the responsibility to "insure public confidence in the fairness of military justice." 96 Cong. Rec. 1362–1363 (Senator Kefauver). Accordingly, it is clear, we submit that Congress did *not* intend to create any implied exception to the finality of military court-martial judgments to enable the federal courts to exercise a collateral-review function over court-martial proceedings (except to the extent that the Constitution was thought to compel an ex-

ception for habeas corpus). The ultimate responsibility for ensuring procedural fairness was entrusted to the Court of Military Appeals. Any other conclusion, such as that asserted by the Court of Claims in insisting that Congress could not have meant the "finality" Article to apply to it, would in practical terms render Article 76 nugatory.[35] The role assumed by the Court of Claims would seriously impair the painstaking congressional plan for the administration of justice in the armed forces.[36]

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[35] The statute of limitations applicable to back-pay actions is six years (28 U.S.C. 2501), and the Court of Claims thus generally hears these cases on a stale record and at a time when retrial would be either impractical or impossible. At the time these present cases were brought, Augenblick was no longer in the Navy, and while Juhl was still in the Air Force, the events underlying his court-martial had taken place some four years earlier (in 1961).

[36] It is not inappropriate, we believe, to point out that events have vindicated the soundness of this congressional judgment. Thus, Chief Justice Warren has observed:

"[O]ur recent experience has shown, I believe, that the Court of Military Appeals can be an effective guarantor of our citizens' rights to due process when they are subjected to trial by court-martial."

Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. Rev. 181, 189 (1962). Other commentators are in accord that the court has in many instances enforced rights and protections even more sweeping than a civilian defendant would be accorded. For instance, Professor Bishop has noted the zeal with which the Court of Military Appeals has "sniffed out" denials of due process where most other courts would not find them. Bishop, *Civilian Judges and Military Justice: Collateral Review of Court-Martial Convictions*, 61 Colum. L. Rev. 40, 57 n. 87 (1961). See, also, Wilson, *Mistrials in Courts-Martial! A Study of the Evolution of the Judicial Character of the Military Judge*, 9 Wm. & Mary L. Rev. 327 (1967); Adam-

3. Respondents' briefs in opposition to the petition for certiorari asserted that the instant decisions of the Court of Claims are in the mainstream of traditional American jurisprudence. We disagree. The construction of Article 76 which we have urged would neither "roll back" any right historically entrenched in the jurisdiction of the Court of Claims nor conflict with any of the pertinent authorities.

The two cases now before the Court constitute the only two instances in which the Court of Claims has awarded back pay to a serviceman court-martialed

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kewicz, *Appellate Consideration of Matters Outside the Record of Trial*, 32 Mil. L. Rev. 1 (1966); Comment, *The Court of Military Appeals and The Bill of Rights: A New Look*, 36 Geo. Wash. L. Rev. 435, 440–443 (1967); Note, *Servicemen in Civilian Courts*, 76 Yale L.J. 380, 389–390 (1966). See, for example, *United States* v. *Jacoby*, 11 U.S.C.M.A. 428 (1960) (depositions on written interrogatories inadmissible at court-martial, on ground they deny right to cross-examine); *United States* v. *Herberg*, 15 U.S.C.M.A. 247 (1965) (search and seizure held illegal under authority of *Preston* v. *United States*, 376 U.S. 364); *United States* v. *Tempia*, 16 U.S.C.M.A. 629 (1967) (holding that *Miranda* v. *Arizona*, 384 U.S. 436, applies to military interrogations); *United States* v. *Lincoln*, 17 U.S.C.M.A. 330 (1967) (further application of *Miranda*); *United States* v. *DuBay*, 17 U.S.C.M.A. 147 (1967) (hearing ordered on allegations of command influence); *United States* v. *Pendergrass*, 17 U.S.C.M.A. 391 (1968) (reversal for improper instructions and remarks in prosecution's argument not based on evidence; prosecution has burden of proving that soldier who refused to go on combat mission on ground that induction was illegal was not under honestly mistaken belief that he did not have to comply with superior's orders).

Additional supervision of courts-martial by the Court of Claims would thus seem not only contrary to the Article 76 but also superfluous. Compare *Military Law: Collateral Attack of Courts-martial in the Court of Claims*, 1961 Duke L.J. 341, 344–348.

under the Uniform Code, on the basis of his claims that the proceedings violated his constitutional rights. Indeed, only twice before in history, once in 1947 and once again in 1966, had the court undertaken to grant back pay on the basis of such claims. *Shapiro* v. *United States*, 69 F. Supp. 205; *Shaw* v. *United States*, 357 F. 2d 949. In neither of those cases, which involved pre-Code offenses and trials, was the conviction obtained under the system of justice now in force. While the Court of Claims did, following enactment of the Code and Article 76, and over the government's consistent challenge to its jurisdiction, continue to entertain such suits, it espoused a restrictive standard of review that resulted in the uniform denial of relief to the claimants. In an unbroken string of decisions during the nineteen years between *Shapiro* on the one end and *Shaw* and the instant cases on the other, the Court of Claims consistently held relief unavailable as a practical matter in cases difficult to distinguish in substance from the present ones." Thus, in terms of actual practice, court-martialed servicemen have not been able to avail themselves of any well established collateral remedy in the Court of Claims.

Secondly, the construction of Article 76 that we believe proper has significant support in decisions by the courts of appeals. We turn first, however, to the decisions relied on by the Court of Claims

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" *E.g.*, *Sima* v. *United States*, 119 Ct. Cl. 405, 425–426 (1951); *Fly* v. *United States*, 120 Ct. Cl. 482, 496–497 (1951); *Begalke* v. *United States*, 148 Ct. Cl. 397, 399–403 (1960) (Reed, J.), certiorari denied, 364 U.S. 865; *Narum* v. *United States*, 151 Ct. Cl. 312, 315 (1961), certiorari denied, 368 U.S. 848.

as betokening exceptions for collateral review of courts-martial by remedies other than habeas corpus; correctly understood, none of those decisions contributes to the result reached below. In *Ashe* v. *McNamara*, 355 F. 2d 277, the Court of Appeals for the First Circuit had before it the question whether it could review the refusal of a service Secretary to exercise the authority conferred upon him by 10 U.S.C. 1552 to correct a military record in order to "remove an injustice". The court held that, notwithstanding the finality provision of Article 76, it could, by mandamus, compel the Secretary to alter the character of the discharge ordered by a court martial that had (the court found) denied the accused his right to counsel. Whatever the soundness of that decision,[28] it is not pertinent here. The Attorney General had previously advised the Secretary of the Army that in light of the congressional purpose to provide a collateral remedy *within* the military establishment by permitting administrative corrections of military records—essentially, to foreclose requests for private-relief bills[29]—he did not believe that subsequent addition of the finality clause to the Articles of War[30] was intended to displace the recently created, express remedy under 10 U.S.C. 1552. See

[28] The Court of Appeals for the Tenth Circuit, in *Smith* v. *McNamara*, 395 F. 2d 896 (C.A. 10), has recently agreed with *Ashe* that there is jurisdiction to review the Secretary's refusal. In that case, involving a pre-Uniform Code court-martial, relief was denied on the merits.

[29] See generally 41 St. John's L. Rev. 114 (1966); H. Rep. No. 449, 82d Cong., 1st Sess.

[30] That provision, like the present Article 76, applied to departments and officers of the United States, as well as to courts.

41 Ops. Att'y Gen. 49 (1949). In light of what we have seen (*supra*, pp. 38–42) was the careful congressional plan for structuring a series of remedies *within* the framework of the military-justice system, it was reasonable to infer that the finality provision was not intended to vitiate the explicit collateral remedy within the military establishment. This in no way suggests, however, that collateral review in the Court of Claims—of uncertain origin and dimension—possesses similar status."[21] It is hardly surprising, therefore, that the First Circuit has recently explained *Ashe* as confined to review of allegedly arbitrary *administrative* action. In *Davies* v. *Clifford*, 393 F. 2d 496 (C.A. 1), affirming dismissal for want of juris-

[21] In the *Juhl* case, respondent unsuccessfully applied to the Air Force Board for Correction of Military Records after completion of the standard military review procedures. The Court of Claims rejected an argument that those proceedings were relevant to its assertion of jurisdiction.

"* * * The argument seemed to be, along the lines of *Ashe* v. *McNamara*, 355 F. 2d 277 (1st Cir., 1965), that this judicial power [to review Correction Board decisions] in some manner overrides the finality language of the Uniform Code of Military Justice, 10 U.S.C. 876. We consider later what effect this finality language has on the scope of our review of the Court Martial itself. Suffice it to say at this point we do not think the finality, whatever it is, is either enhanced or diminished by the Board proceedings. The case stands before us exactly as if plaintiff had never gone to the Board.* * *"

(A. 386). We agree with this reasoning. The Boards for Correction of Military Records review many types of military actions: disability retirements and administrative discharges, as well as court-martial convictions. The legislative history of the statute which established the Correction Boards, 10 U.S.C. 1552, indicates that there was to be judicial review "under appropriate circumstances." H. Rep. No. 449, 82d Cong., 1st Sess., at p. 3. The "appropriate circumstances" are, we be-

diction in *Davies* v. *McNamara*, 275 F. Supp. 278 (D.N.H.), the court was asked to declare void on constitutional grounds a court-martial conviction that the Court of Military Appeals had declined to review. In holding the civil courts without power to consider such requests, the court expressly refused to follow *Augenblick* insofar as it "impl[ies]" that jurisdiction exists to review courts-martial "other than via writ of habeas corpus." 393 F. 2d at 497, n. 2.

Nor does *Gallagher* v. *Quinn*, 363 F. 2d 301 (C.A.D.C.), certiorari denied, 385 U.S. 881, also relied upon by the Court of Claims, point in the direction travelled below. In that case, the court of appeals merely assumed jurisdiction in a mandamus proceeding to determine the constitutionality of the provision

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lieve, defined by the nature of the underlying action which the Correction Boards reviewed. Thus the Correction Board action may be reviewed for substantial evidence where the question is a denial of an application for military disability retirement pay. *Beckham* v. *United States*, 375 F. 2d 782, 785 (Ct. Cl. 1967), petition for certiorari dismissed under Rule 60, 389 U.S. 1011. But clearly no such review of Correction Board action is available when a court-martial is in issue.

In *Ashe* v. *McNamara*, the court of appeals relied on *Harmon* v. *Brucker*, 355 U.S. 579, as establishing that administrative action under 10 U.S.C. 1552 is reviewable. 355 F. 2d at 281–82. However, in *Harmon* v. *Brucker*, which did not involve a court-martial, this Court rested jurisdiction on the established principle that "judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers." 355 U.S. at 581–82. No reference was made to 10 U.S.C. 1552 as establishing a basis for judicial review. Thus *Harmon* is perfectly consistent with the principle that the availability and extent of judicial review depends on the nature of the underlying action which the Correction Board reviewed.

of the Uniform Code separating the jurisdiction of the Court of Military Appeals into allegedly discriminatory categories of mandatory and discretionary review. Relief was denied on the constitutional merits. But, quite evidently, the issue before the court was *not* whether civil courts may collaterally reexamine courts-martial where habeas corpus will not lie; it was, rather, whether the Court of Military Appeals could be required to exercise its powers of direct review of military trials.

On the other hand, in addition to the recent decision in *Davies, supra*, pp. 46–47, other attempts to involve the civil courts in reviewing courts-martial by routes other than habeas corpus have been rebuffed. Thus, in *Goldstein* v. *Johnson*, 184 F. 2d 342 (C.A.D.C.), certiorari denied, 340 U.S. 879, at about the time Congress was considering the finality article of the draft Code, a cashiered soldier sought declaratory and injunctive relief to vitiate his court-martial conviction. The court of appeals relied on the finality provision of the Articles of War to find a lack of jurisdiction, explaining:

> While it is well established that the writ of habeas corpus is not suspended by such a provision, it is equally well settled that in the absence of physical confinement the courts cannot interfere with nor in any way review court-martial proceedings. * * * [184 F. 2d at 343]."

Compare *Kauffman* v. *Secretary of the Air Force*, 269 F. Supp. 639 (D.D.C.), appeal pending, C.A.D.C. No.

When this Court was asked to authorize the issuance of mandamus to compel the Secretary of War to annul an order of a military officer-classification board, whose determinations Con-

21,227. Thus, it would appear, our contention that Article 76 operates to preclude Court of Claims review of courts-martial is fully in keeping with the understanding of the other federal courts.

II

IF ARTICLE 76 DOES ALLOW THE COURT OF CLAIMS TO CONTINUE TO ENTERTAIN BACK-PAY SUITS CHALLENGING THE SENTENCES OF COURTS-MARTIAL, THE COURT'S FUNCTION REMAINS LIMITED TO ASCERTAINING WHETHER THE COURT-MARTIAL AT ISSUE POSSESSED "JURISDICTION" IN THE TRADITIONAL SENSE

The Court of Claims in its *Augenblick* decision pointed out that, in a number of cases decided around the turn of the century, court-martial convictions were subjected to collateral attack in actions for back pay. *Runkle* v. *United States,* 122 U.S. 543; *United States* v. *Fletcher,* 148 U.S. 84; *Swaim* v. *United States,* 165 U.S. 553; *United States* v. *Brown,* 206 U.S. 240. Because of some statements in the legislative history of Article 76 indicating that it was intended to codify

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grees had declared "final and not subject to further revision", the Court unanimously agreed that mandamus would not lie. After observing that the board was lawfully constituted and acting within its subject-matter jurisdiction, the Court held:

"It is settled beyond controversy that under such conditions decisions by military tribunals, constituted by act of Congress, cannot be reviewed or set aside by civil courts in a mandamus proceeding or otherwise. [*United States ex rel. French* v. *Weeks,* 259 U.S. 326, 335, citing court-martial cases]."

See, also, *Shaw* v. *United States,* 209 F. 2d 811 (C.A.D.C.).

prior law,[28] the argument is made that Article 76 could not have been intended to affect the availability of the back-pay remedy as a means of collaterally reviewing a court-martial conviction.

As the Court of Claims itself recognized, however, and as we have pointed out (*supra*, pp. 34–35), in the old cases in which back pay actions were utilized to obtain collateral review of courts-martial, review was limited to "jurisdiction" of the court-martial in the traditional sense of that term—*i.e.*, jurisdiction over the person and offense, due convening of the court-martial, authority of the appointing officer and members of the court, and authority to impose the sentence. See cases cited *supra*, pp. 34–35. Legal or constitutional error in the course of the proceedings of a duly constituted court-martial was not considered jurisdictional error. Thus, in *Keyes* v. *United States*, 109 U.S. 336, this Court refused to allow relief in a back pay action challenging a court-martial as fundamentally unfair on the ground that the officer who preferred charges and testified also served as a member of the court:

> That the court-martial, as a general court-

[28] Article 76 was derived from Article 50h of the Articles of War, which was added in the 1948 revision. 41 Stat. 787, *et seq.*, as amended, 62 Stat. 637. See S. Rep. No. 486, 81st Cong., 1st Sess., p. 32; H. Rep. No 491, 81st Cong, 1st Sess, p. 35. The legislative history of Article 50h indicates that it was intended to make the existing finality of court-martial sentences "more definite" and "explicit." H. Rep. No. 1034, 80th Cong., 1st Sess., p. 12; *Hearings before House Armed Services Committee, Subcommittee No. 11*, on H.R. 2575, 80th Cong., 1st Sess., at p. 2118 (testimony of Brigadier General Hubert D. Hoover, Assistant Judge Advocate General of the Army).

martial, had cognizance of the charges made, and had jurisdiction of the person of appellant, is not disputed. This being so, whatever irregularities or errors are alleged to have occurred in the proceedings, the sentence of dismissal must be held valid when it is questioned in this collateral way. * * *

109 U.S. at 340."

The decisions in *Moore* v. *Dempsey*, 261 U.S. 86, and *Johnson* v. *Zerbst*, 304 U.S. 458, marked the beginning of the expansion of the concept of "jurisdiction" in reviewing state criminal convictions by federal habeas corpus. This enlarged sense of "jurisdiction" has permitted the district courts considerable latitude in determining whether the state criminal process has adequately protected the defendant's federal constitutional rights.[35] With a single exception in a

[34] In *Keyes*, the accused had failed to challenge the propriety of allowing a witness and accuser to sit on the court. However, the Court did not consider this failure dispositive. In another case where there was also no objection to the composition of the court-martial, the Court on habeas corpus upset a conviction on the ground that all the members of the court were rendered statutorily ineligible to sit, and thus that the court had no jurisdiction to act. *McLaughry* v. *Deming*, 186 U.S. 49.

[35] At the time the Uniform Code was enacted, it was the prevailing view that *Johnson* v. *Zerbst* and *Moore* v. *Dempsey* signaled an expansion in the traditional scope of habeas corpus review of state convictions, which had previously been confined to review of "jurisdiction" in a narrower sense. See *Shapiro* v. *United States*, 69 F. Supp. 205, 207–208 (Ct. Cl. 1947); *Burns* v. *Wilson*, 346 U.S. 137, [redacted] (opinion of Frankfurter, J.). 845-849
It was also the view taken by Arthur John Keffe, one of the key consultants of the Department of the Navy in the drafting of the Code, in an article which Senator Morse, during the debates on the Code, referred to as "one of my key exhibits"

truly exceptional case,"[*] however, at the time the Uniform Code was enacted there had been no Court of Claims' decisions invoking the *Johnson* v. *Zerbst* concept of "jurisdiction" to upset court-martial convictions in back-pay suits. And while the Court of Claims had concluded that the expansion of the concept of "jurisdiction" for purposes of habeas corpus review of criminal convictions automatically carried over to collateral review of court-martial convictions (*Shapiro* v. *United States, supra*, 69 F. Supp. at 207–208), this Court, in a later decision handed down shortly before final passage of the Code, repudiated that notion. Even where collateral review of a court-martial was sought by resort to constitutionally protected habeas corpus, the traditional concept of "jurisdiction" was held to control:

> The single inquiry, the test, is jurisdiction. * * *
> In this case the court-martial had jurisdiction

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and inserted in the Congressional Record. 96 Cong. Rec. 1434–1435, 1439. More recently however this Court has reviewed the history of habeas corpus and concluded that it has always been available to redress violations of fundamental procedural rights, even where the convicting court had "jurisdiction" in the narrow sense. *Fay* v. *Noia*, 372 U.S. 391, 399–415. However, for purposes of ascertaining the "existing law" with respect to court-martial finality, which Congress may have intended to codify in Article 76, the basic question is what Congress understood the "existing law" to be.

[*] *Shapiro* v. *United States, supra*, note 35, a case in which the Court of Claims viewed the "trial" as an empty charade. The Army had itself recognized that circumstances like those surrounding Shapiro's court-martial rendered the trial void. See 35 Geo. L. J. 558, 559 (1947). In fact, on the personal recommendation of the Secretary of War, the President had granted Shapiro a pardon. See Pasley, *The Federal Courts Look at the Court-Martial*, 12 U. Pitt. L. Rev. 7, 30 (1950).

> of the person accused and the offense charged, and acted within its lawful powers. The correction of any errors it may have committed is for the military authorities which are alone authorized to review its decision. * * *

Hiatt v. *Brown*, 339 U.S. 103, 110–111." Compare *Goldstein* v. *Johnson*, 184 F. 2d 242 (C.A.D.C.), certiorari denied, 340 U.S. 879 (finality clause barred non-habeas relief notwithstanding *Johnson* v. *Zerbst*).

In short, existing law at the time of the passage of the Uniform Code established only that collateral review of court-martial convictions in suits for back-pay extended to the "jurisdiction" of the court-martial in the traditional sense of that term. Thus, insofar as the legislative history may indicate that Article 76 was intended to codify "existing law" with respect to

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" The opinion of the court of appeals in *Hiatt* bears a striking resemblance to the opinion of the Court of Claims in *Augenblick:*

"The record of this court-martial conviction is replete with highly prejudicial errors and irregularities which have manifestly operated to deprive this petitioner of due process of law. * * *

"While each of the above errors and irregularities may not constitute a jurisdictional defect in itself, still when we consider the cumulative effect of the highly prejudicial errors present, we are led unerringly to the conclusion that this petitioner has not been accorded a fair trial, even under military law. * * *"

Hiatt v. *Brown*, 175 F. 2d 273, 277 (C.A. 5). This Court reversed the decision and upheld the court-martial, stating that the court of appeals had extended its review too far. 339 U.S. at 110.

As recently as 1962, Chief Justice Warren explained that, even on habeas corpus, civil court review of courts-martial is confined to inquiries into "jurisdiction", "using the term 'jurisdiction' in its narrowest sense." *The Bill of Rights and the Military*, 37 N.Y.U.L. Rev. 181, 187.

finality (see note 83, *supra*, p. 50), it establishes at most that back-pay suits might still lie to test "jurisdiction" in the traditional sense. This legislative history in no way detracts from the plain language of the statute and the legislative history previously discussed. There can be no question that the court martial in *Augenblick* satisfied all traditional "jurisdictional" requisites. To the extent that it may be argued that there was a jurisdictional defect in this sense in *Juhl*, our discussion below, pp. 74–77, will dispel any such contention.

III

EVEN IF BACK-PAY SUITS PERMIT THE SAME SCOPE OF REVIEW OF COURT-MARTIAL PROCEEDINGS AS IS AVAILABLE ON HABEAS CORPUS, UNDER NEITHER FORM OF COLLATERAL REVIEW MAY CONVICTIONS BE UPSET IF THE MILITARY TRIBUNALS HAVE AFFORDED ADEQUATE CONSIDERATION TO THE CONSTITUTIONAL CONTENTIONS

1. If the Court concludes that neither alternative we have thus far discussed should be adopted, but instead decides that back-pay suits are to be treated on the same basis as a proceeding by way of habeas corpus, the approaches and decisions of the Court of Claims in the present cases must still be regarded as erroneous. In *Burns* v. *Wilson*, 346 U.S. 137, a habeas corpus case brought by prisoners under sentence of death imposed by court-martial, the petitioners alleged that they had been subjected to illegal detention; that they had been denied counsel of their choice; that their confessions had been coerced; that the military authorities had suppressed evidence favorable to the

defense, procured perjured testimony, and otherwise interfered with preparation of the defense; and that the trials were conducted in an atmosphere of terror and vengeance. This Court held that habeas corpus was properly denied:

> These records make it plain that the military courts have heard petitioners out on every significant allegation which they now urge. Accordingly, it is not the duty of the civil courts simply to repeat that process—to reexamine and reweigh each item of evidence of the occurrence of events which tend to prove or disprove one of the allegations in the applications for habeas corpus. It is the limited function of the civil courts to determine whether the military have given fair consideration to each of these claims * * * We think they have.

346 U.S. at 144.[38]

This ruling, which has since been followed by the lower federal courts,[39] has been heretofore followed by the Court of Claims as the ultimate test in its post-

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[38] The opinion containing the quoted ruling commanded the vote of only four Justices. However, Mr. Justice Minton's failure to concur in the plurality opinion was based on the view that it set forth too *broad* a scope of review—his position was that review on habeas corpus is limited to "jurisdiction" in the traditional sense even where the military authorities did not give adequate consideration to the prisoner's constitutional contentions. 346 U.S. at 146, *et seq.* (concurring opinion). Thus a majority of the Court subscribed to the view that habeas corpus review of court-martial convictions is more limited than habeas corpus review of state and federal criminal convictions.

[39] *E.g.*, *Smith* v. *McNamara*, 395 F. 2d 896 (C.A. 10); *Kauffman* v. *Secretary of the Air Force*, 269 F. Supp. 639, 646 (D.D.C.), appeal pending (C.A.D.C. No. 21,227); *Swisher* v. *United States*, 354 F. 2d 472, 476 (C.A. 8); *Mitchell* v.

Shapiro reviews of court-martial cases." We believe—assuming that it is necessary to reach this question—that the standard of *Burns* v. *Wilson* is appropriate and must govern the Court of Claims.

2. The decision in *Burns* recognized that the extent to which federal courts may review court-martial convictions must be determined in light of the relationship between the federal courts and the military; since this relationship differs from the relationship of the federal courts to the state courts, the problem cannot be solved simply by a mechanical application of the concept of "jurisdiction" as it has been developed in habeas corpus review of state criminal convictions. These differences support the conclusion that the scope of federal collateral review of court-martial convictions should be more limited than federal collateral review of state criminal convictions.

a. Congress has given this Court direct appellate jurisdiction over the decisions of state courts where federal constitutional rights are involved. 28 U.S.C. 1257. Accordingly, recognizing collateral review of state criminal convictions on the same grounds—

Swope, 224 F. 2d 365 (C.A. 9); *Chandler* v. *Markely*, 291 F. 2d 157 (C.A. 7), certiorari denied, 368 U.S. 960; *Palomera* v. *Taylor*, 344 F. 2d 937 (C.A. 10), certiorari denied, 382 U.S. 946; *Bennett* v. *Davis*, 267 F. 2d 15 (C.A. 10); *Rushing* v. *Wilkinson*, 272 F. 2d 633, 641–642 (C.A. 5).

[40] See, *e.g.*, *Shaw* v. *United States*, 357 F. 2d 949, 953 (Ct. Cl.); *Begalke* v. *United States*, 148 Ct. Cl. 397, 401 (Reed, J.), certiorari denied, 364 U.S. 865. It was because of the court's own recognition of this limited function that one of its closest observers predicted that in no case tried and appealed under the Code would the Court of Claims find relief appropriate. See Brenner, *Judicial Review by Money Judgment in the Court of Claims*, 21 Fed. B.J. 179, 191 (1961).

while it avoids both the time limits applicable to direct review by this Court as well as the inherent inadequacy of casting on this Court the sole burden of protecting federal rights in particular cases—does not represent a radical alteration in the historical or institutional relationship between the federal and the state courts. On the other hand, Congress has not granted this Court jurisdiction to review, by certiorari or otherwise, the judgments of military tribunals. Cf. *Ex parte Vallandigham*, 1 Wall. 243. Indeed, as we have noted (pp. 40–41, *supra*), in considering the Uniform Code, Congress deliberately rejected proposals which would have given the federal courts authority to entertain direct appeals from the decisions of the Court of Military Appeals, in the belief that that court could be entrusted with the responsibility for ensuring the fairness of court-martial proceedings. In this context, both historical tradition and legislative policy caution against recognition of expansive or pervasive collateral review as a route whereby the federal civil courts undertake to render decisions on matters which they could not otherwise consider. This does not, of course, mean that collateral review is completely unavailable; it does, however, suggest that it is appropriate to reject an attempt to analogize the scope of collateral review of state convictions to that of courts-martial—especially where the constitutional right of habeas corpus is not involved.

b. Military law involves concepts and practices that have no precise or, sometimes, even approximate analogues in civilian law—a disparity which reflects the fact that even today the military is necessarily, in

many ways, a separate society, based on concepts of rank and discipline wholly foreign to civilian life. Of course we do not dispute that we are governed by one Constitution which—except insofar as it specifically provides otherwise—applies also to military justice. But the differences between general military law and civil law and the differences between typical factual contexts in the military and in civilian life are much more profound than the differences in viewpoint and circumstance between state and federal courts.[41] And since federal judges—in the district court or on the Court of Claims—are unlikely to possess any significant familiarity with military law and military society, there is greater justification for the federal civil courts to defer to the decisions of military tribunals, functioning in their own milieu, when it appears that those special tribunals have given full and fair consideration to the issues involved.

The present cases aptly illustrate this point. Augenblick was convicted under Article 134 of the Code; this Article, and Article 133, making criminal "conduct unbecoming an officer and a gentleman", "disorders

[41] The law of search and seizure offers an example. To a civilian, the right of privacy in one's home has the same meaning whether it is a federal or state official who conducts the search; thus it is appropriate for the federal courts to impose detailed standards in this area on the state courts, because both courts can approach the problem with the same basic background. But in a military context, the right of privacy may not have the same meaning. Certainly for men living in barracks, one would not expect the same type of privacy as a civilian enjoys in his home. See, *e.g.*, *United States* v. *Gebhart*, 10 U.S.C.M.A. 606 (1959), and *United States* v. *Harman*, 12 U.S.C.M.A. 180 (1961).

and neglects to the prejudice of good order and discipline", and "conduct of a nature to bring discredit upon the armed forces" (10 U.S.C. 933, 934), would appear quite extraordinary in a civilian environment. These Articles reflect the concept of military rank—an alien concept in civilian society.[42] This concept affected the treatment of both Commander Augenblick and Sergeant Juhl. Without being dealt with arbitrarily, both of these men received much more serious punishment than their accomplices. From the military standpoint, it was entirely natural to impose more severe punishment on respondents since both men held higher rank than their accomplices: Commander Augenblick was an officer who had commanded a vessel, while Sergeant Juhl was Non-Commissioned Officer in Charge of Law Enforcement and Security in his Squadron. But in civilian eyes such a difference in treatment immediately casts suspicion on the reliability of the accomplice testimony—the testimony which was at the heart of the Court of Claims' decisions in both cases. Thus these cases are excellent examples of how differences between the military and civilian courts in their appreciation of the context a case can discolor the civilian tribunal's assessment of what has occurred. In these circumstances, we submit, the Court of Claims erred in failing to defer to the informed determinations by the military tribunals to which Congress has entrusted the responsibility of supervising court-martial proceedings, and the court

[42] See generally, Winthrop, *Military Law and Precedents* (2d ed., 1920) at 710, *et seq.*, 720, *et seq.; Smith* v. *Whitney*, 116 U.S. 167, 183–186.

thereby transgressed the standard appropriately set by *Burns*.

3. In *Augenblick*, all of the questions considered by the Court of Claims were fully and fairly considered by the military tribunals. The law officer fully cooperated with the defense in endeavoring to determine the existence and whereabouts of any producible statements. Lengthy and detailed testimony was taken on the question of the missing tape. (See pp. 9–16, *supra*). And although very little testimony was taken regarding the written notes, this was attributable to the defense's failure to cross-examine Agent Mendelson on this point, although counsel had two opportunities to do so after learning that notes had been taken. (See p. 17, *supra*). On appeal, the Board of Review wrote a lengthy opinion (A. 17–48) fully canvassing the Jencks Act questions. Commander Augenblick was represented before the Board by distinguished civilian counsel (A. 17), and the Jencks Act issue was also fully illuminated in the dissenting opinion of a Board member (A. 48–58). That his analysis did not persuade his two colleagues hardly supports the inference that they did not give "fair" consideration to the issues.

Nevertheless, the Court of Claims took the position that the full and fair consideration test of *Burns* v. *Wilson* was not met because the law officer and the Board of Review "committed serious legal errors" in their consideration of Commander Augenblick's claims. (A. 337–338). But a legal error in a tribunal's decision does not mean that the tribunal failed to give full and fair consideration to the matter before

it. Moreover, the legal errors which the Court of Claims purported to find were closely tied to its view of the facts of the case. Clearly the court's finding of "legal error" was affected by its highly debatable assessment, years after the trial, of the importance of Airman Hodges' testimony; of the credibility of Mendelson's testimony regarding the possible disposition of the tape of Hodges' interrogation; of the diligence of the defense in view of its failure to cross-examine Mendelson regarding the nature of his written notes; and of the adequacy of the record evidence concerning the tape and the notes. As a basis for finding legal error, the Court of Claims re-evaluated the evidence concerning all of these matters—which it clearly could not do even under the scope of review applicable in habeas corpus proceedings. *Burns* v. *Wilson,* 346 U.S. 137, 142.[42]

In *Juhl,* the question of accomplice testimony was not considered by the court-martial because defense counsel—who concededly "knew his way around court martials" (~~Court of Claims opinion, p. 13~~) *expressly rejected* the law officer's offer of an instruction on this question. ~~(R. 454)~~. Indeed, the Court of Claims conceded that the law officer "doubtless * * * would have delivered, if requested, [the accomplice testimony] in-

A. 384

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[42] In this regard, *Augenblick* embodies a significant departure from the only other decision besides *Shapiro* in which it had awarded back-pay on the ground that a court-martial conviction violated constitutional rights. In *Shaw* v. *United States, supra,* 357 F. 2d at 953–954—Shaw, like Shapiro had been tried before enactment of the Uniform Code—the court emphasized that it was considering a pure question of constitutional law uncomplicated by any factual inquiry.

struction." (A. 384). In these circumstances, Juhl is hardly in a position to charge lack of full and fair consideration of the accomplice testimony point; a tribunal cannot be said to have refused to consider a point that was not only not urged, but was affirmatively disavowed. Moreover, at the court-martial, counsel concentrated on an attempt to impeach the accomplice testimony directly, and the law officer gave the court extended instructions on impeachment. (A. 384). Thus, the basic question of the credibility of the accomplices' testimony was squarely placed before the military court for resolution in the fact-finding process.

The Court of Claims, in *Juhl*, based its decision on its own extensive reevaluation of evidence already considered by the court-martial, in clear violation of *Burns* v. *Wilson, supra.* The court's holding was based on its view that the accomplice testimony was self-contradictory; that the other testimony, placing Juhl on excursions with other airmen concededly engaged in black market activity at the same time, did not tend to corroborate Juhl's complicity in such activity (despite Juhl's position as NCO in charge of Law Enforcement and Security); and that the testimony of Mrs. Hughes was "utterly devoid of probative value." (Opinion, p. 9). All of these matters required the court to engage in a detailed review of the evidence, an excursion plainly beyond the permissible scope of collateral review of a court-martial, by any procedure.

A. 380

IV

EVEN UNDER THE STANDARD OF JOHNSON V. ZERBST, THE FACTS OF THE PRESENT CASES DO NOT WARRANT COLLATERAL DISPENSATION FROM THE COURT-MARTIAL CONVICTIONS

UNITED STATES V. AUGENBLICK

If the Court should determine that the standard of review established by *Johnson* v. *Zerbst*, 304 U.S. 458, and confirmed in later cases, for granting habeas corpus relief to state prisoners applies not only to habeas corpus review of court-martial convictions but also to suits in the Court of Claims, the judgments below must still be reversed.[*]

1. The facts of the *Augenblick* case do not even remotely approach—either in terms of the seriousness of the alleged violations or their prejudicial effect—the situations in which this Court has set aside state convictions on the ground of the prosecution's failure to disclose evidence. In all such cases, there has been a showing that the prosecution deliberately withheld evidence that would clearly have been helpful to the defense, or deliberately used evidence known to be false in light of facts known to the prosecution but not to the defense. *Mooney* v. *Holohan*, 294 U.S. 103 (knowing use of perjured testimony); *Pyle* v. *Kansas*, 317 U.S. 213 (same); *Miller* v. *Pate*, 386 U.S. 1 (prosecution "deliberately misrepresented the truth");

[*] Acceptance of this standard would of course necessitate considerable departure from the Court's prior decisions holding that "in military habeas corpus the inquiry, the scope of matters open for review, has always been more narrow than in civil cases." *E.g.*, *Burns* v. *Wilson*, 346 U.S. 137, 139; see *Hiatt* v. *Brown*, 339 U.S. 103, 110–111; *Whelchel* v. *McDonald*, 340 U.S. 122, 124, 126; *In re Yamashita*, 327 U.S. 1, 17, 23.

Alcorta v. *Texas*, 355 U.S. 28 (knowing use of false testimony by prosecution); *Napue* v. *Illinois*, 360 U.S. 264 (prosecution failed to correct testimony which it knew to be false); *Brady* v. *Maryland*, 373 U.S. 83 (prosecution deliberately failed to reveal evidence favorable to the accused.)

In the present case, there has been no showing of deliberate suppression of evidence favorable to the accused, or deliberate and conscious use of false evidence. Rather, Augenblick alleged (and the Court of Claims found) that certain inadequacies existed in the *procedure* whereby the law officer inquired into the question whether the tape of Hodges' interrogation had been knowingly or culpably destroyed by a government agent, and whether an agent's written notes of that interrogation were a substantially verbatim transcription, producible under the Jencks Act. Moreover, these purported violations pertained only to testimony which was explicitly rejected by the findings of the court-martial (see p. 8, *supra*). Even under the most generous view of the rule of *Mooney* v. *Holohan*, *supra*, such violations do not amount to a violation of due process warranting collateral relief."

" The concurring opinion of Mr. Justice Fortas in *Giles* v. *Maryland*, 386 U.S. 66, 96–99, suggests that due process is violated by the prosecution's "concealment of information which is material, generously conceived, to the case, including all possible defenses." In the present case, there has been no showing that the prosecution concealed information; the Court of Claims merely found that there were inadequacies in the procedure whereby the law officer sought to ascertain what had happened to certain putative Jencks "statements". Moreover, even under the most "generous" conception, it is difficult to understand how the de-

In the present case, it it not necessary to determine the extent to which the Jencks Act may have "constitutional overtones." See *Palermo* v. *United States*, 360 U.S. 343, 362–363 (concurring opinion of Brennan J.).[44] Even if it be conceded that the Constitution requires an opportunity for the defendant to inquire into the availability of pre-trial statements of prosecution witnesses, that opportunity was afforded here. And the procedure followed by the law officer—even if it did violate the Jencks Act (and we do not believe that it did)—was not fundamentally deficient in a constitutional sense. Certainly the complete details of the Jencks Act procedure, as interpreted and applied by the federal courts, have not been incorporated into the due process clause. See *Scales* v. *United States*, 367 U.S. 203, 257–258.

1. *The tape recording*

In the case of the tape recording, the record reveals a careful and probing inquiry into all the relevant circumstances. At the request of the defense, a special pre-trial investigation was convened, at which the four government agents most directly concerned with the Hodges interrogation testified at length concerning the

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fense could have been further aided by non-evidentiary items which, at most, might have served to undermine the credibility of a witness whose testimony was in any event rejected by the court-martial.

[44] Compare the opinion of the Court in *Palermo*, which ascribes the *Jencks* decision, 353 U.S. 657, and the Jencks Act to the power of the Court and Congress to prescribe rules of procedure for the federal courts. 360 U.S. at 345, 347–348, 353 n. 11.

circumstances of the interrogation, the recording facilities at the room where Hodges was interrogated, the ONI office routine concerning the custody and reuse of tape recordings, and the fate of the Hodges tape. (A. 98–185). The matter was re-examined at the court-martial itself; at that stage eight government agents testified, and there was an extremely detailed inquiry into ONI procedures for custody of tape recordings. (A. 212–254). The transcript of these two hearings reveals a painstaking and thorough effort on the part of the law officer and the prosecution to discover what had happened to the Hodges tape recording.

Yet the Court of Claims concluded that two errors had been committed: the court found erroneous the law officer's failure to recall Agent Mendelson from Norfolk to testify at the court-martial, and concluded that the Board of Review wrongly placed the burden of proof on the defense. But the question whether a witness should be recalled to explain inconsistencies between his testimony and what develops in later testimony is surely a matter which should be left to the trial judge;[47] indeed, this is the rule even on direct review of a federal criminal conviction where the question is one of compliance with the Jencks Act. The law officer obviously considered carefully the defense's

[47] See *Palermo* v. *United States*, 360 U.S. 343, 353, stressing the need for entrusting the administration of the Jencks Act to the "good sense and experience" of district judges subject to "appropriately limited review of appellate courts."

request for a recall of Agent Mendelson," and it is certainly not appropriate for the Court of Claims, on collateral review several years later, to second-guess his decision. Mendelson had already testified both at the court of inquiry (A. 76–86) and at the pre-trial investigation (A. 128–141), and to recall him from Norfolk would have further delayed the proceedings."

The Court of Claims acknowledged that "evidentiary rulings are generally within the province of the trier", but stated that the basis for this rule was inapplicable here because the law officer did not personally observe Mendelson as he testified: "the fact that Mendelson did not appear before the law officer is the critical point." (A. 133). However, the Court of Claims overlooked the fact that at the close of the pre-trial investigation at which Mendelson did testify, the defense specifically waived any findings by the investigating officer—who had personally observed Men-

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[15] Mendelson had been transferred to Norfolk subsequently to the Augenblick investigation; the other agents who were called to testify at the court-martial concerning the tape recording were still in the Washington area.

The law officer stated: "I might admit that this is a difficult decision for me because I don't want to hamper the defense in any way on this issue, and yet I do not want to call a witness needlessly if he can add nothing to his previous testimony." (A. 251).

[16] At the first court-martial, which was terminated because of a defect in the pre-trial investigation, the delays occasioned by hearings before the law officer on procedural points had so irritated the court that, in the opinion of one member of the Board of Review, a new trial would have been required simply in order to avoid prejudice to the defense. (A. 49–54).

delson's demeanor while on the stand—and instead agreed that the purpose of the investigation was fulfilled by a transcription of the testimony. (A. 184–185). In these circumstances, Augenblick can hardly now complain that the assessment of Mendelson's testimony was made later by the law officer when the issue arose at the trial, without personally observing Mendelson repeat his previous testimony.

Nor was there any violation of the Constitution—or, indeed, of the Jencks Act—in the allocation of the burden or proof regarding the Hodges tape recording. Here, of course, the question is how the law officer, rather than the Board of Review, viewed the burden of proof. The law officer clearly stated his awareness that the burden was on the prosecution:

> I did not mean to indicate, and do not indicate that I feel that the burden is on the defense in any respect in this matter. I feel that it is upon the government to produce or explain why it doesn't produce.

(A. 255). The actions of the law officer and the prosecution make it abundantly clear that all parties fully accepted the principle that it was the duty of the government, rather than the defense, to produce all the evidence that was available once a Jencks Act issue had been raised. All of the government agents who had anything to do with the matter were called and gave testimony. By producing all of the witnesses in its control, the government fully complied with this Court's decision in *Campbell* v. *United States*, 365 U.S. 85.

Once the government met its burden of going forward, the remaining question of who bore the ultimate burden of persuasion is, in this case, irrelevant." Here, the law officer clearly had no doubt on the primary question—*i.e.*, whether the tape could be presently located. He ruled: "The government has satisfied me, at least, that reasonable effort has been made to locate this tape; the results have been negative." (A. 256). There was abundant evidence to support this finding. (See pp. 9–16, *supra*). While the evidence did not demonstrate what had in fact happened to the tape, the law officer ruled, with ample foundation, that there was no indication "of any attempt to suppress this particular evidence." (A. 256).[51]

Even on direct review under the Jencks Act, this Court has stressed the importance of the discretion of the trial court, *Palermo* v. *United States*, 360 U.S. 343, 353, and has ruled that the trial-court proceeding

[50] The principle that a litigant should not have the burden of "establishing facts peculiarly within the knowledge of his adversary"—relied on in *Campbell* v. *United States*, *supra*, 365 U.S. at 96, to hold that the government rather than the defense must produce an FBI agent to testify regarding a pre-trial statement—has no relevance once all the testimony is in, and the sole question is how any remaining doubts should be resolved.

[51] See, also, West, *The Significance of the Jencks Act in Military Law*, 30 Mil. L. Rev. 83, 86 (1965), where it is suggested that because of alternate procedures under the *Manual for Courts-Martial*, defense counsel in courts-martial did not often invoke the Jencks Act; the author also notes that "CID case notes and sound recordings that are *not* made a part of the formal report" are not as carefully preserved as are the records and reports specified by military law.

is not to be rigidly "controlled by rules governing the allocation between the parties of the burdens of proof or persuasion." *Campbell* v. *United States*, 365 U.S. 85, 95. Here, the law officer heard extended testimony concerning ONI office procedures, the possibilities that the tape may have been reused, the likelihood it could have been traced if it had been reused, the circumstances of recording, and the possibility of mechanical failure. To leave to the law officer the assessment of this evidence and evaluation of the significance of Mendelson's testimony, rather than to concentrate on a formal rule regarding the burden of persuasion, can hardly be thought inconsistent with fundamental fairness and due process.

2. *The written notes*

At the court of inquiry, Mendelson testified that he made "rough pencil notes" (A. 80) and at the later pre-trial investigation he testified that "I did jot down a couple of rough notes." (A. 132). On the basis of this evidence, the law officer and the Board of Review concluded that these notes were not a "substantially verbatim" statement producible under the Jencks Act, 18 U.S.C. 3500(e)(2). This conclusion was also supported by the testimony of Agent Connor, who conducted the bulk of the interrogation of Hodges. Connor testified that Mendelson had asked Hodges a number of questions, but that he did not believe that Mendelson had been taking notes (A. 108-109). If Mendelson had been taking verbatim notes at the interrogation, it seems unlikely that he could have participated in it himself, or that Connor

would have failed to notice that a detailed transcription was being made.

The Court of Claims apparently conceded that the thrust of this evidence was adverse to the Jencks Act claim, but concluded that the law officer and the Board of Review had doubts as to the character of the notes and therefore should have taken additional evidence. However, neither the law officer's ruling nor the opinion of the Board of Review exhibits any doubt on this score: the law officer unequivocally characterized them as "rough notes" (A. 212), while the Board of Review flatly concluded that:

> The notes do not meet the criteria of a "statement" as set forth in (e)(2) of 18 U.S.C. 3500. There is ample evidence of record that the notes were "a few rough notes" and not a verbatim recital of the oral statement made by Airman Hodges at the initial interview.

(A. 43).

Nor was the Court of Claims correct in concluding that, as a matter of fundamental fairness and due process, the law officer should not have reached a conclusion regarding the character of the notes without first taking more evidence. The question of how much evidence is needed before such an inference may be drawn is a matter for the discretion of the trial judge, or in this case the law officer. And in exercising this discretion, it was proper for the law officer to consider that the defense had not utilized either of its prior opportunities (at the court of inquiry and the additional pretrial investigation) to question Mendelson more closely regarding the character of the

notes."[22] In these circumstances, reversal of the conviction on direct appeal would not have been justified. And, clearly, these circumstances fall far short of justifying collateral attack even by the most expansive standards.

3. The prejudicial effect of Hodges' testimony

The defense in this case obviously succeeded in undermining Hodges' credibility in the eyes of the court-martial: although Hodges testified in unequivocal terms that Augenblick committed a completed act of oral sodomy (A. 189–190), the court-martial found him not guilty of this offense. Even the court below recognized that "Hodges must have been a very dubious witness. His veracity was obviously questioned by the members of the court-martial." (A. 340). Thus, it is difficult to understand how any Jencks Act violation which may have prevented a *further*

[22] The Court of Claims stated that the Board of Review rested its affirmance of the law officer's ruling "in part on its factually erroneous statement (twice repeated) that accused's counsel did not ask for the notes at the pre-trial proceedings." (A. 337). The court's charge of mistake rests on an affidavit attached to Augenblick's reply brief in the Court of Claims (also attached to the Brief in Opposition in this Court), stating facts that were not before the Board of Review. The affidavit, signed by Augenblick's military defense counsel, declared that, after the court of inquiry, counsel called Mendelson to ask for the notes, and was told that Mendelson had looked for his notes and failed to find them.

Even if knowledge of these extra-record facts is somehow chargeable to the law officer and the Board of Review, the fact remains that the defense failed to utilize two separate opportunities to cross-examine Mendelson as to whether the notes were of a character required to be produced under the Jencks Act.

attack on Hodges' credibility can be said to have been so prejudicial as to render the trial "fundamentally unfair."

The court-martial's finding that Augenblick was guilty of lewd and lascivious conduct was wholly based on the unimpeached testimony of the two arresting police officers. Those officers were recalled at the specific request of the court and subjected to questions submitted by the court as to the precise details of what they observed (A. 296, 297–299, 301–303). The court thereupon not only found Augenblick guilty of the lesser included offense, but also drafted a finding which manifests reliance on the testimony of the police officers. (A. 309).[22]

The Court of Claims reasoned that the testimony of the police officers was not necessarily inconsistent with Augenblick's defense that he was asleep and thus did not act knowingly and wilfully. (A. 340). The court was apparently speculating that the court-martial may have relied upon Hodges' testimony insofar as it tended to negate Augenblick's defense of sleep (else there could not have been a conviction even on the lesser offense). However, the only part of Hodges' testimony that negated this defense was Hodges' description of Augenblick's performance of the act of oral sodomy (A. 189–190). Nothing else in his testimony was any more *inconsistent* with Au-

[22] The court's finding was that Hodges had committed the lesser offense "by wilfully and knowingly placing his head in the lap of the said Hodges with his face in close proximity to the exposed penis of the said Hodges." (A. 309). The finding was drafted by the court with the assistance, requested by the court, of the law officer. (A. 305–308).

genblick's contention that he was asleep than was the testimony of the officers who observed him in a most compromising position. Although we strongly object to the propriety of this sort of *post hoc* speculation about what might have been in the minds of the fact-finders, we follow the approach of the court below only to highlight the unreliability of *its conclusion*. For, had the court-martial accepted that part of Hodges' testimony which refuted Augenblick's defense, it would necessarily have found Augenblick guilty of oral sodomy. That it did not find him guilty of this offense makes clear that the court-martial in *no* material way relied on Hodges' testimony in reaching its decision. Accordingly, there was no conceivable "error" in Augenblick's court-martial that cannot fairly be said, beyond a reasonable doubt, to have been harmless. Cf. *Chapman* v. *California*, 386 U.S. 18.

UNITED STATES V. JUHL

In *Juhl*, the Court of Claims conceded that what it determined to be non-compliance with the *Manual for Courts-Martial* was not a constitutional violation. It then asserted that it may review for "statutory" as well as constitutional violations, at least where the statute is phrased in terms sufficiently emphatic to warrant the label "jurisdictional". However, even assuming that the *Manual for Courts-Martial* is equivalent to a statutory procedure,[4] we know of no case holding that a statutory rule of evidence—however

[4] The Court of Claims recognized that the *Manual* was promulgated by Executive Order, but concluded that it is equivalent to a statute because it was adopted pursuant to

emphatically expressed—is a basis for collateral attack on a court-martial. Indeed, in *Humphrey* v. *Smith*, 336 U.S. 695, this Court held that the provision in the Articles of War for a pre-trial investigation—expressed in language at least as emphatic as the accomplice-testimony rule here involved—was not "jurisdictional" and would not warrant collateral relief by habeas corpus.[55] Then, in *Whelchel* v. *McDonald*, 340 U.S. 122, the Court considered whether habeas corpus could be used to test compliance with various provi-

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statute and had to be reported to Congress. (~~Opinion, pp. 16–17~~). A. 387-388

The authority for the promulgation of the *Manual* appears in Article 36 of the Uniform Code, 10 U.S.C. 836, which empowers the President to prescribe the "procedure, including modes of proof, in cases before courts-martial * * *, which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts * * *."

The Court of Military Appeals has authoritatively described this Article, and the *Manual* promulgated pursuant to it, as paralleling, respectively, the grant of authority to this Court under 28 U.S.C. 2072 and 18 U.S.C. 3771 to prescribe the rules of practice and procedure in civil and criminal proceedings in the district courts, and the Rules issued under these statutes. See *Levy* v. *Resor*, 17 U.S.C.M.A. 135, 139–140 (1967).

The *Manual* was drafted by military officers as a guidebook summarizing the rules of evidence applied by court-martial review boards. See U.S. Department of Defense, *Legal and Legislative Basis: Manual for Courts-Martial, United States, 1951*, p. 241, explaining the paragraph regarding accomplice testimony. See, also, Ackroyd, *Professor Morgan and the Drafting of the Manual for Courts-Martial*, 28 Mil. L. Rev. 14 (1965).

[55] *Humphrey* involved Article 70 of the Articles of War, which provided in relevant part: "No charge will be referred to a general court-martial for trial until after a thorough and impartial investigation thereof shall have been made." 336 U.S. at 697.

sions of the *Manual for Courts-Martial* cast in terms no less peremptory than those used in Paragraph 153a, here at issue." The Court held that a collateral remedy was not available to litigate those contentions. Only an opportunity to tender the issue of insanity was held required, and only a denial of the opportunity for the military to consider the claim "goes to the question of jurisdiction. * * *. Any error that may be committed in evaluating the evidence tendered is beyond the reach of review by the civil courts." 340 U.S. at 124.

The Court of Claims decided that the question of internal consistency and independent corroboration of accomplice testimony somehow rises to the dignity of a "jurisdictional" issue in the traditional sense because, in addition to being explained in the *Manual* in strong terms, it also "goes to the basic fairness of the trial * * *" (A. 394). It is difficult indeed to imagine how anything could be more intimately related to the fairness of a criminal proceeding than the question whether the accused is either competent to be tried or criminally responsible for his actions, yet it was the evidentiary satisfaction of precisely those untempered directives in the *Manual* that this Court in *Whelchel* held to be beyond the function of the civil courts to reexamine.

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* In *Whelchel*, the defense relied on was insanity. Various paragraphs of the *Manual* declared that the "court will inquire into the existing mental condition of the accused * * *", that if the court finds the accused "not mentally responsible, it will forthwith enter a finding of not guilty * * *", and that where a reasonable doubt as to responsibility exists, "the accused can not legally be convicted of that offense." 340 U.S. at 124-125 n. 2.

As *Whelchel* would suggest, the fact that considerations of fairness and reliability may underlie the traditional accomplice-testimony rule does not imply that a civil court may collaterally determine when the rule has been followed and treat departure from it as vitiating the proceedings. Most rules of evidence are prompted by considerations of fairness or reliability. Yet surely the finality provision of Article 76 of the Uniform Code, if it means anything, must leave the military courts free at least to interpret and to apply the procedures and rules of evidence in the Uniform Code and the *Manual For Courts-Martial*. Both the military and the civil courts have traditionally treated the accomplice-testimony rule as going to credibility and sufficiency of evidence—normally matters to be determined by the trier of fact, not reexamined even on direct appeal.[17] These matters are especially inappropriate for consideration by the Court of Claims on collateral attack, reviewing a cold record, and thus lacking even the most basic opportunity to venture even an educated guess as to relative credibility.

In this case, despite its disclaimer to the contrary, the Court of Claims was deeply involved in determin-

[17] The Court of Military Appeals treats questions of compliance with paragraph 153a of the *Manual* as going to the sufficiency of the evidence, rather than the "jurisdiction" of the court-martial. See *United States* v. *Polak*, 10 U.S.C.M.A. 13; *United States* v. *Armstrong*, 4 U.S.C.M.A. 248. That court disclaims a role in reexamining determinations of credibility. See, *e.g.*, *United States* v. *Taylor*, 5 U.S.C.M.A. 775; *United States* v. *Stewart*, 1 U.S.C.M.A. 648.

In the federal courts, the responsibility of the appellate court is to insure that the jury is instructed—if the defense so re-

ing questions of credibility and sufficiency of evidence. Perhaps the most illuminating demonstration of this fact appears from the twenty-odd pages of its opinion and findings assessing the evidence (A. 375–382, 404–417), including determination of such questions as the "veracity, character, and motives of Airman Hughes" (A. 405), and the "veracity and character" of Airman Shields (A. 414). For example, the court concluded that the testimony by non-accomplices—which placed Sgt. Juhl at the scene of the black-market activity on at least three separate occasions—was not *sufficient* corroboration: "Corroboration cannot be found in the mere presence of the accused near the scene of the crime." (A. 380). However, in this case the non-accomplice testimony was to the effect that Juhl—who was Non-Commissioned Officer in Charge of Security and Law Enforcement for an Air Force Squadron—was a member of small groups of other Air Force personnel on excursions during which the others concededly engaged in black-market activity. We find it remarkable indeed that the Court of Claims believed it beyond the

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quests—that accomplice testimony should be considered with great caution. If that instruction is given, a conviction may be based solely on accomplice testimony; the court will not review the jury's application of the rule to the evidence in the case. *United States* v. *Karavias*, 170 F. 2d 968, 971 (C.A. 7); *Toles* v. *United States*, 308 F. 2d 590, 592 (C.A. 9); *United States* v. *Marino*, 275 F. 2d 129 (C.A. 2); *Dunn* v. *United States*, 318 F. 2d 89 (C.A. 5); *Joseph* v. *United States*, 286 F. 2d 468, 469 (C.A. 6). Since the instruction on accomplice testimony here was not requested (indeed, it was specifically waived), Juhl's conviction—had it been in a district court—could not have been upset on direct appeal.

realm of reason for the fact-finders to have viewed it as unlikely that Juhl would have been invited to go on such excursions in those circumstances unless his complicity was assured.

In addition, the Court of Claims concluded that Mrs. Hughes, who was not an accomplice, was not a sufficiently corroborative witness because her mastery of English was poor, and because her hubsand had apparently coached her. But the court-martial itself was surely in the best position to assess these matters: it observed Mrs. Hughes testify, and it also took testimony, from a military policeman present during the conversation between Airman and Mrs. Hughes, as to the extent and nature of the alleged coaching. (A. 364–369).

What the Court of Claims did here—as reflected in its extensive analysis of the evidence—was simply to weigh for itself whether testimony given years earlier was uncertain or unworthy of belief. This is not, and has never been, an adequate basis for collateral review of a court-martial conviction or a civilian criminal conviction, in any form of collateral proceeding.

Conclusion

Accordingly, by whatever standard that may be applied, the Court of Claims seriously overstepped its jurisdiction; the judgments in both cases should therefore be reversed.

Respectfully submitted.

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